No. 2404

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MAURY I. DIGGS,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF THEO. J. ROCHE, SPECIAL ASSISTANT TO THE ATTORNEY GENERAL OF THE UNITED STATES.

THEO. J. ROCHE,
Special Assistant to the Attorney General.

JEREMIAH F. SULLIVAN,
Of Counsel.

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I.

General Statement of the Case Showing Main Facts Relied Upon by Government to Sustain Conviction.

PARTIES INVOLVED IN RUIN AND DOWNFALL OF MARSHA WARRINGTON AND LOLA NORRIS.

In the latter part of September, 1912, Miss Marsha Warrington was standing on the sidewalk of a Sacramento street with a lady friend, Miss Bowers, waiting for a street car. While there Mr. Monte Austin, of the firm of Austin & O'Brien, keepers of a saloon in the Diepenbrock Building, came along in company with Maury I. Diggs. Aus-

tin had know Miss Warrington before. He was, as the record discloses, a friend of the Diggs family, and welcome to the Diggs household. The relations of Austin with the Diggs family are shown in an account given by Diggs himself on the stand, of a dinner and dancing party held in December, 1912, or January, 1913. He said:

> (333) "We had a dinner party at Mr. Hamilton's place in the top flat of the same building. There are six flats. Mine was on the ground floor and his was on the top floor. The two houses were not large enough to have as many people as we wanted to have there and dance, which they wanted to do; so we agreed to have the dinner up in Mr. Hamilton's place. Mr. Hamilton and his wife, my sister-in-law, my wife and myself, Miss Warrington and Mr. Austin were all present. *I invited Mr. Austin and he said he would bring Miss Warrington.* * * * *I arranged the party and had her come. My wife called her up on the telephone and invited her. I called for Mr. Austin at the saloon and went with him to Miss Warrington's house and got her and then took her to my house.* * * * So after the dinner broke up we went down to my apartment and pushed back the furniture and Miss Warrington and my wife took turns in playing the piano and we all ragged. Mr. Austin sang. He was quite a singer; he sang until about half past eleven. *Mr. Austin had to leave and that broke up the party.* He had to go back to the saloon. I got the machine and took Miss Warrington and Mr. Austin home. Mr. Austin got out at Eighth and 'K' and I took Miss Warrington on home. I believe it was in January."

This Monte Austin with whom Diggs was on terms of such intimacy, on the evening when Miss

Warrington and her friend, Miss Bowers, were standing waiting for the car, introduced Diggs to Marsha Warrington. Miss Warrington had never known Diggs before. At the time of the meeting Marsha Warrington was not quite twenty years of age, having been born November 11, 1892 (Rec. 242-3). She had resided in Sacramento ever since her birth (Rec. 230). Her own mother had died when she was but five years old, and her father having married again, she lived with her father and stepmother and the other members of her father's family (Rec. 230). For a year prior to this meeting, late in September, she had been employed as a stenographer in the office of her father (Rec. 243), the agent at Sacramento of the Santa Fe Railway Company (Rec. 234). Diggs was some years older than Marsha, having been born on May 21, 1886. He was an architect by profession, in good business standing and doing quite a business in his line in Sacramento, and had as offices three rooms in the Diepenbrock Building, located not far from the saloon of Austin & O'Brien, likewise located in Diepenbrock's property. He had at one time been State Architect (Rec. 320). He was married, his wife being a trifle younger than he. At the time of the trial in August, 1913, she testified that she was just twenty-five years of age (Rec. 366). Of the Diggs marriage there was one young child,—a daughter.

Among the young friends of Marsha Warrington there was one with whom she was especially inti-

mate,—Lola Norris. Lola lived about eight blocks away from the Warrington home with her parents, whose only child she was (Rec. 230). Lola was slightly younger than Marsha, having been born August 3, 1893 (Rec. 261). For about a year prior to the so-called Reno trip she was employed in the State Library in the Capitol at Sacramento. Diggs had a friend with whom he was especially intimate, a boon companion in the person of F. Drew Caminetti, of about his own age, who was employed as a clerk in the office of the State Board of Control in Sacramento. He also was married and lived with his wife and two young children. At the trial of the Diggs case, in August, Caminetti's wife gave the ages of her children as follows: One six months old and the other two years old (Rec. 361). At the time of the Reno trip, March 10, 1913, the younger child must have been but a few weeks old. Diggs, in his testimony, says that Caminetti, on January 31, 1913, stated that his wife was just about to go to a hospital. In all probability the child was born in the hospital about the time of the San Francisco trip in the middle of February, 1913 (Rec. 321).

DIGGS DETERMINED FROM THE START TO MAKE A CONQUEST OF THE YOUNG GIRL, MARSHA WARRINGTON.

Diggs apparently must have been much impressed by Miss Warrington at his first casual meeting, when his friend Austin introduced him to her. He determined to meet her again and become intimately acquainted with her.

Diggs, in his cross-examination, thus refers to his meeting with Marsha Warrington:

> (346) "I first met Marsha Warrington, I think it was in September, 1912, at the corner of Tenth and 'K' Streets. About two weeks after that I met her again. I believe Mr. Austin told me that she was living with her father and stepmother about three or four days after I met her the second time. * * * I suppose I figured she was living at home and must have been living with her parents. I first met Miss Norris October 7 or 8 or somewhere along there I believe. Miss Warrington introduced her to me. *It was an arrangement that Miss Warrington and Mr. Caminetti had made to have me take them riding.*"

CAMINETTI WAS THE INSTRUMENT OF DIGGS IN ARRANGING THE PRELIMINARIES THROUGH WHICH THE PARTY OF FOUR WAS CONSTITUTED.

This second meeting, the arrangement of which was ascribed by Diggs to Miss Warrington and Mr. Caminetti, was absolutely arranged at the instigation of Diggs himself. At page 261, Lola Norris testifies with reference to this matter as follows:

> "I was twenty years of age on the 3rd of August; I live with my parents at 1012 'P' Street, and I know Miss Marsha Warrington; have known her several years intimately, and know her parents—stepmother and father, and she is acquainted with my parents and I have known Maury I. Diggs. I have known Mr. Diggs since the last part of October, 1912; I was employed at the State Capitol in the State Library; I also know F. Drew Caminetti, have known him a little over a year. * * * Up to the latter part of October, 1912, I had barely a speaking acquaintance with Mr. Caminetti.

During the latter part of October I met both Diggs and Caminetti together. Miss Warrington was with me when I met them. *Mr. Caminetti called me up on the telephone and asked me if I would introduce him to Miss Warrington so he could make her acquainted with Mr. Diggs; that Mr. Diggs was desirous of meeting her. I told Mr. Caminetti I thought he was acquainted with her and he said he thought not; that Mr. Diggs had told him that he did not know Miss Warrington, and so I agreed to do that.* I had never seen Mr. Diggs before, and do not remember who introduced him to me, whether it was Miss Warrington or Mr. Caminetti."

THIS FIRST AUTOMOBILE RIDE WAS THE BEGINNING OF A FAST AND FURIOUS RACE ON THE DOWNWARD GRADE FOR THE FOUR MEMBERS OF THE "JOY-RIDING" PARTY.

The meeting on this first ride in Diggs' automobile, driven by himself, was fraught with disastrous consequences not only to Marsha Warrington, but to the whole party, including Lola Norris, who on that evening for the first time went out with Caminetti, and who never before had known Diggs.

G. A. Putnam, sporting editor of the Sacramento Bee, who had known Marsha Warrington for four years, saw the parties as they met at the automobile, and at once became solicitous for the future of his friend. He thus refers to the matter (Rec. 313-14). Speaking of Marsha Warrington, he said:

"The first I saw her in company with Diggs was on the first night she went out with him, I believe, because *I saw him introduced to her upon that evening and I was solicitous for her reputation.*"

This solicitude of Putnam for his young lady friend was well warranted. That night was the beginning of the rapid downfall of Marsha Warrington and that of her young friend, Lola Norris.

MARSHA WARRINGTON'S STORY OF HER DOWNFALL.

At page 244 Marsha Warrington refers to some of the events occurring in November or December following her introduction to Diggs.

> "Previous to the two weeks before my departure" (the Reno trip) "I went up to the office of Mr. Diggs but not very often. Mr. Caminetti and Miss Norris were with me. I remember going there in the month of December and having some champagne. Mr. Diggs got it and I remember sexual relations with Mr. Diggs upon that occasion." (Later on witness fixes the disgraceful episode in Diggs' office in the month of November.) "Sexual intercourse took place between Mr. Diggs and I more than once at his office."
>
> (245) "I remember going to Jackson with Mr. Diggs and Miss Norris in an automobile on election night in November, 1912, for the purpose of getting Mr. Caminetti. We came right back the same night and got home a little after twelve o'clock, I think. We all had something to drink. Mr. Diggs and Mr. Caminetti procured the drinks. I do not know what it was we drank. It was a mixture. I never received anything of value from Mr. Diggs but a vanity box.
>
> (246) "I remember that one night upon my return from San Francisco I went to Folsom with Mr. Diggs, Joe O'Brien, to whom I have referred, and Miss Norris. I remember having dinner at Folsom. I had some intoxicating liquor at that time but I do not remem-

ber what it was. * * * The first sexual intercourse I ever had with Mr. Diggs was in his office in November, 1912."

TEMPEST IN A TEAPOT: ALLEGED MISCONDUCT OF GOVERNMENT COUNSEL IN ASKING DIGGS IF CERTAIN QUESTIONS ASKED BY HIS COUNSEL WERE NOT PROMPTED BY HIM.

The matters above narrated by Marsha Warrington were brought out on Marsha Warrington's cross-examination by defendant's counsel. In this connection it may be well to refer to a question asked by defendant's counsel, reference to which by counsel for the government has been made the subject of frequent and rather severe attack as misconduct on the part of government counsel as well as severe criticism of the trial judge.

In their discussion of the evidence counsel for plaintiff in error claim that the representatives of the government were not justified in claiming that Diggs himself prompted questions on a certain line which tended to bring out clearly the intimate and disgraceful relations that existed between Diggs himself, and his victim, Marsha Warrington. One of the questions which afford ground for this comment by government counsel is the following, shown at page 246:

"Q. I will ask you if during the month of January, between the 12th and 15th, probably on the 12th of January, 1913, if you did not go to the house of Mr. Diggs on 14th Street, between I and J, while Mr. Diggs' wife was in Woodland? You and Lola Norris, Mr. Caminetti and Mr. Diggs, and if you did not

> sit down on a couch in the dining room, and if you did not have some conversation there and if you did not thereafter say: 'This is no place for us' to Mr. Diggs and go from the dining room into another room, a bedroom, and lock the door?"

If that question was not prompted by Maury I. Diggs, it must have originated without provocation in the wonderfully fertile brain of some one of his counsel. No other person on earth than the reluctant witness then on the stand, outside of Diggs himself, knew of the circumstances referred to in the question of his counsel. The prompting by a party in interest of questions to his counsel is a matter which has come under the observation of every lawyer or judge who has participated in more than one trial in any court of justice. The prompting is discernible alike by the ear and by the eye. But whether observed by the eye or the ear of any juror, no sane man could suspect for a moment that the question above quoted from the record, had its origin in any other source than the prompting of the defendant, Maury I. Diggs, made to his counsel either immediately at the time of the question or in advance thereof. In fact, in his own examination, he directly admits such to be the fact. At page 352 the following language of Diggs is shown:

> "It was the latter part of December or the first part of January, somewhere along there, I don't remember the exact date, that Miss Warrington, Miss Lola Norris, Mr. Caminetti and I were in my residence during the (353)

absence of my wife. My wife was in Woodland at that time for two or three days. I informed Miss Warrington, Miss Norris and Caminetti of that fact when they wanted to visit my house. All four of us went to my house about 8 o'clock in the evening. I left my machine at 'H' Street between 13th and 14th, about half a block from my residence. I went home in advance of the other party and told them they would have to come around the back way through the rear entrance if they wanted to go in. They went around to the back door and I opened the door. They knocked when they came and I let them in. They had to pass the front door of the house and they went through the rear by an alley way. The house is located on the corner of an alley way. I did not see them when they passed in front of the house, as I was in the house already. After they all came in we sat down together and enjoyed ourselves. Mr. Caminetti went to the kitchen and dug up the drinks out of the pantry and served the remainder of a pint bottle of cocktails, about three drinks I think. They were dealt out to the two girls and myself by Caminetti. I should judge we were in the house that night for a half or three quarters of an hour, three quarters of an hour probably. Miss Warrington took me into the bed room, the door was locked; *that was the bed room occupied jointly by myself and wife.*

(354) Q. And did you and Miss Warrington there have sexual intercourse?

A. I would rather not speak of the relation.

Q. Please answer the question.

A. I would rather not speak of my relation with Miss Warrington.

Q. *Don't you remember during the cross-examination of Miss Warrington suggesting to your counsel and in the presence of the jury that they ask Miss Warrington if on that occasion she and you did not go into your bed*

room and if she did not lock the bed room door? Do you remember suggesting that question to your counsel in the presence of the jury during the cross-examination of Miss Warrington?

A. She locked the door.

Q. *Didn't you suggest that question to your counsel?*

A. *Well, I suggested that to my counsel a long time before I came into the courtroom.*

WITNESS (continuing). *That suggestion may have been made by me during the cross-examination of Miss Warrington. I don't remember. I won't say that I didn't make the suggestion.*

Q. Did you not on the occasion mentioned, at the time the four of you went to your home, have sexual intercourse with Miss Warrington on the very bed that you and your wife occupy at home?

A. If you insist upon the question I will answer it, Mr. Sullivan.

Q. Answer it.

A. Miss Warrington and I went to the bedroom and——

Q. Answer it yes or no.

The COURT. Answer it yes or no and you can explain afterwards if you wish to.

A. Yes."

At page 355 appears the question which seems to have excited the ire of defendant and his counsel.

"Mr. SULLIVAN. Q. Mr. Diggs, during the course of this trial and in the presence of the jury here, during the cross-examination of Miss Warrington, did you not repeatedly suggest to your counsel questions to be propounded to Miss Warrington asking her if she did not at divers times have intercourse with you?

In the course of the argument justifying the asking of that question, one of the counsel for the government said:

> "The witness upon the stand at this time expresses or apparently expresses a reluctance to testify to an act of intercourse between himself and Miss Warrington. If it be true that on the cross-examination of this young girl in the presence of the jury, and in an audible tone of voice he did put to his counsel questions and to have put these questions to her for the purpose of eliciting from her lips the fact that he did have on numerous occasions intercourse, that fact should go to the jury for the purpose of enabling them to determine whether in declining a moment ago to answer whether he had intercourse on his wife's bed with this young girl he was acting in good faith."
>
> * * * * *
>
> Mr. DEVLIN. Inasmuch as they have commented on the conduct of the defendant and attacked his motive I ask the privilege at this time of allowing him to explain his reasons.
>
> The COURT. You can have him explain that later on. * * *"

Following the suggestion that the explanation might be made later and the request of Mr. Devlin to be permitted to make further reply to Mr. Roche's suggestions, the trial judge said:

> (356) *"The jury all understand that the argument of counsel arising on an objection is not evidence in the case and is not to be considered by the jury in determining the issue to be submitted to them.*
>
> * * * * *
>
> The COURT. We will instruct the jury at the proper time for instructing them."

DIGGS' EXPLANATION: HIS OWN STORY OF HIS CROWNING ACT OF INFAMY.

The explanation promised by his counsel and given by Diggs is shown during the redirect examination by Mr. Devlin.

> (359) "The trip to my home upon the occasion when the four of us were present occurred before the dinner and dancing party (the dinner and dancing party occurred in December or January).
>
> Q. As Mr. Sullivan asked you about it, state what occurred on that occasion."

Objection to the question having been made the court overruled the objection so as to permit the witness to make the explanation desired to be made upon cross-examination.

> "Mr. DEVLIN. You were going to explain an answer. I will give you a chance to explain it.
>
> * * * * *
>
> A. We were sitting on a couch in the dining-room, Miss Warrington, Miss Norris and I,—and Caminetti went out in the kitchen and got this bottle of cocktails, there were hardly three full glasses; the girls did not drink any, I believe—I believe Marsha drank a part of a glass, a very small bit of it, and I believe I drank a glass and so did Mr. Caminetti. I got up from the couch and went over and sat down in a chair. Miss Norris and Mr. Caminetti lay down on the couch in the dining room. Miss (360) Warrington said to me 'This is no place for us.' She said 'Isn't there a place around here where we can lie down?' *'I said, 'Certainly' and we went in the bedroom and the door was locked. I don't exactly remember whether I locked the door, whether Miss Warrington locked the door or whether she told me to lock*

it. Anyhow, she went over and lay down on the bed, and I went over and lay down with her and the inevitable happened, of course. During the progress of this Miss Warrington said to me, 'What would your wife do if she could see us now?' I said 'It is pretty hard to tell what my wife would do to you and to me too.' In a short while she says, 'Well, Mrs. Diggs has got nothing on me', laughed about it and got up and said 'I beat her to it in her own bedroom', and got up and walked out to the dining-room."

This story was intended by Diggs to smirch the partner of his illicit pleasure. Does it not by his own oath-bound utterance, exemplify his own degradation and degeneracy?

MARSHA WARRINGTON'S STORY OF HER ILLICIT RELATIONS WITH MAURY I. DIGGS, CONTINUED.

Following the disgraceful episode in Diggs' house in his wife's bedroom, Marsha Warrington continued her story of the immoralties of the party of four.

At page 247 she said:

"The act of sexual intercouse did not very frequently pass between Mr. Diggs and me prior to my going to Reno. I remember going on an automobile trip with Mr. Diggs and Mr. Caminetti on the upper Stockton Road about a week before the Reno trip."

THE TRIP TO SAN FRANCISCO AND SAN JOSE IN FEBRUARY, 1913.

At page 243 she says:

"I remember going to San Francisco with Mr. Diggs and Mr. Caminetti and Miss Norris

> and going to the Grand Hotel in that city, during the month of February, 1913, and staying there all night with Mr. Diggs in that month. Mr. Caminetti and Miss Norris stayed there on the same occasion. Mr. Diggs registered there, I think he told me, under a fictitious name, as man and wife. I occupied the same room with Mr. Diggs separately, and Mr. Caminetti and Miss Norris occupied another room together, in the same hotel. I slept alone with Mr. Diggs that night and Miss Norris slept alone with Mr. Caminetti that night."

This trip was about the time of the birth of Caminetti's younger child and the confinement of his wife in the hospital in Sacramento (321).

At page 247 Marsha Warrington fixes the date of the automobile ride on the upper Stockton road as being about a week before the Reno trip. In that connection the witness said further:

> "About a month before that automobile trip on the upper Stockton road I apprised Mr. Diggs that I was with child."

At page 253 Marsha Warrington testified to the circumstances of her being an invited guest at the dinner and dance party of the Diggs and Hamilton families by invitation of Mr. and Mrs. Diggs. It appears from the testimony of Diggs himself that this dinner and dance party occurred subsequently to the occasion when Diggs in his own house had defiled his marriage bed.

Miss Warrington testifies:

> "I took dinner at the home of Mr. and Mrs. Diggs as stated in my direct examination, in

1912. I do not remember the date. I have nothing by which I can fix the time. Mr. and Mrs. Diggs invited me there to dinner. It was an oral invitation over the telephone. I suppose she telephoned from home. She was home when I went to dinner."

At page 257 Miss Warrington was questioned as follows:

"Q. You were asked by counsel upon the other side of this case whether you recalled distinctly an event which took place in Mr. Diggs' office in the month of November, 1912, during the course of which some champagne was given you by the defendant. You remember the occurrence, do you?

A. Yes. *The occurrence is vividly impressed upon my mind because it was the first time I had had sexual intercourse with any one.*

(258) Prior to that act of intercourse, which you say was the first time you had ever had intercourse in your life, had you been supplied with any intoxicating liquor, and if so, what?

A. Champagne.

Mr. ROCHE. I am referring now, of course, Miss Warrington, to while you were there in the office on that occasion and prior to this act of intercourse.

Q. At the time you say you had that intercourse and which you say was the first time you had had intercourse in your life, in what condition were you as a result of that champagne?

A. *I was rather intoxicated.*

(259) *At the time I went to Reno I was pregnant by Mr. Diggs and informed Mr. Diggs of that condition about a month before.* We always went to one road house. * * * Upon these occasions Mr. Diggs and Mr. Caminetti ordered the drinks and one of them would pay for them. Upon one occasion at a road house

between Stockton and Sacramento I refused to drink some liquor ordered by Mr. Diggs and he knocked the glass out of my hand. * * * We took the trip to San Jose because Mr. Diggs asked us to go and said that he had to go down on business and wished very much to have us accompany him, and he said we would possibly have to register as man and wife, but that Miss Norris and I would occupy the same room and that he and Mr. Caminetti would have the other. We reached San Francisco between 11 and 12 at night. Mr. Diggs took me in one room and locked the door. Immediately afterwards Miss Norris tried to get in. I don't remember how long she tried to get in. I was only at the Columbia Hotel once. I went there with Miss Norris and remained there half an hour. That was the only time I had ever been in the hotel and the only time I saw the defendant there. At that time he said something about hiding from the police *because of some juvenile offense. He said it was something connected with his stenographer.* Upon one of the occasions that I was at his office I found a letter, and upon calling Mr. Diggs' attention to it, he said it was from his stenographer."

LOLA NORRIS TELLS THE STORY OF HER SHAME.

Lola Norris was less than twenty years old when Diggs and Caminetti started out on their nefarious joint enterprise of adultery and conquest, and of ruin of the two girls, Marsha Warrington and Lola Norris, who stood just at the threshold of womanhood. The story of Lola Norris, of her personal and joint experience, does not disclose as precipitate a downfall on her part as on that of her friend, but it shows her as ultimately reaching the same lower level, without the possible concomitant of

maternity of a bastard child, begotten by the boon companion of Maury I. Diggs. Of her experience between that first ride in October, 1912, and her train ride on her way home from the Reno bungalow of debauchery, she furnishes an account which we condense as follows:

> (261) "I live in Sacramento. I have lived there all my life. I was twenty years of age upon the 3rd of August (1913). I live with my parents at 1012 'P' Street. I know Miss Marsha Warrington; have known her several years intimately and know her parents, stepmother and father. * * * Between the date of this first event in the latter part of October, 1912, and the time the four of us left for Reno we met three or four times a week. I remember hearing Mr. Diggs talking about the relations which existed between himself and his wife. He said he was not very happy with his wife; he made that statement a number of times. Mr. Caminetti also told me he was not living happily with his wife; he told me several times that he and his wife had about agreed to separate, but never told me anything more definitely than that. * * * Mr. Maury I. Diggs told me over the telephone on one occasion that he and his wife had positively agreed to separate and that his wife was going to apply for a divorce within a few days. This was some time before the trip to Reno. Mr. Diggs spoke a number of times in the presence of Miss Warrington about not being happy with his wife.
>
> (262) We visited one road house in Sacramento; just one. There was dancing going on there at the time and I danced. I remember also stopping at another place over in Stockton called the 'Heidelberg'. * * * On our rides in the machine we would sometimes stop in front of taverns or road houses and have

drinks brought out to us but not often. Either Mr. Diggs or Mr. Caminetti would order the drinks. I don't know how many times I visited Mr. Diggs' office in Sacramento during those two months at night,—possibly six or seven times. I remember stopping at the Columbia Hotel one night. I visited the hotel with Miss Warrington once about a week before our trip to Reno and stayed there about three quarters of an hour. Mr. Diggs and Mr. Caminetti were there. I noticed manifestations of affection between Mr. Diggs and Miss Warrington between the latter part of October, 1912, up to the time we left for Reno. He told her he loved her. *He said he would get along much better with Miss Warrington than with his wife. Mr. Caminetti also manifested his affection towards me in the presence of Diggs. He told me that he loved me a number of times. He frequently put his arms around me and caressed me* (271). I remember going to Folsom with Miss Warrington, Mr. Diggs and Mr. Caminetti; we just rode up there and came right back. * * * I also recall a visit to Jackson made with Mr. Diggs and Miss Warrington in Mr. Diggs' machine. I also recall the trips made to San Francisco and San Jose from Sacramento."

TRIP OF THE PARTY OF FOUR TO SAN FRANCISCO AND SAN JOSE IN FEBRUARY, 1913.

Speaking of the trip to the Grand Hotel in San Francisco and the over-night stay in the hotel at San Jose, Lola Norris testified:

(271) "When we first talked about coming down here to San Francisco it was the idea that we should start early in the morning—Sunday morning—and come back that night. Then it was suggested why not start Saturday afternoon, because it would hurry the trip so to go

and come back on the same day. So we talked about it, and I said I didn't like to do that because I didn't like to remain away all night, because Miss Warrington and I did not have any friends with whom we could stay down here. Then Mr. Diggs and Caminetti told us that that did not make any difference, that they would get us a room to stay any place we wanted, and that all we had to do was to name the place we wanted to stay and they would get us a room (272), and if we wanted them to they would go some place else. We did not decide to go right then. I told Miss Warrington the next day I didn't think they would do that, and she told them what I said, and they resented the fact and became highly indignant that I did not think they would treat us right. Finally we were convinced that they meant what they said, and we went. When we got here to San Francisco, it was rather late, and we went to a hotel. * * * The clerk showed Mr. Diggs and Miss Warrington to one room and Mr. Caminetti and me to an adjoining one. They registered before that. We went into the room, Mr. Caminetti and I, I expecting that as soon as the clerk left Miss Warrington and I would take one room and Mr. Diggs and Mr. Caminetti the other. I waited until the clerk got out, so as not to cause him to be suspicious, and as soon as the clerk left I started toward the door of the room which Mr. Diggs and Miss Warrington occupied. And just before I reached it I heard the key turn in the lock so I went to the door and tried it and it was locked. This was the door connecting the two rooms. I knocked at the door and I called but nobody answered. I must have called off and on for an hour. I continued knocking and called 'Marsha' for a long time but nobody answered. Then I went around to the other door and that also was locked. I went to both doors and nobody answered me at all. Then

> I came back in the room. I knocked for such a long time that Mr. Caminetti told me that if I didn't stop making such a noise they would come and put us all out, so I stopped finally and I went back to the room with Mr. Caminetti and stayed there all night but did not sleep. I don't think I took off any of my clothing, that I remember, that night. The next morning we had breakfast and then we rode around a while, Mr. Diggs had to get a new tire for his machine and we expected to get home that night which was Sunday night; we spent almost the whole afternoon looking for a place where we could buy a tire. Finally he got one and we started towards San Jose. This was about four o'clock. * * * Then Mr. Diggs told us and Miss Warrington, too, that she did not think we would have time to get home that night, they said it was too late then to start out for home in the hope of getting home before very late, and so they said the only thing left to do was to stay in San Jose that night."

Poor Marsha Warrington at that time had long since passed her November experience in Diggs' office and their illicit relationship had evidently been fully established.

Miss Norris continues:

> (273) "When we arrived in San Jose we had dinner first and then went to a hotel and stayed all that night. I occupied a room with Mr. Caminetti and Miss Warrington another room with Mr. Diggs."

According to the story of Miss Norris, Caminetti only consummated his foul purpose of possessing himself thoroughly of the body of Miss Norris dur-

ing the sojourn in the Reno bungalow. Before reaching Reno she had, during the greater part of the night, occupied the same berth with Caminetti in the drawing room of the Pullman car on which they traveled. Speaking of the first day in Reno, at page 274, Miss Norris testified as follows:

> "Mr. Diggs and Mr. Caminetti went over to the clerk's desk in the office of the hotel and reserved three rooms, a suite of rooms. And we were shown up to our rooms. Mr. Diggs told us that *he had registered as Mr. Enright and wife, and Mr. Caminetti registered as Mr. Ross.* The rooms were adjoining. We stopped at that hotel one night. There were three rooms, two bedrooms and a sitting room. *Mr. Caminetti and I occupied one and Mr. Diggs and Miss Warrington the other. I discarded most of my wearing apparel that night.*"

After the first night spent in the Riverside Hotel, the bungalow was secured for the party. Speaking of the bungalow, Miss Norris said:

> (275) "Ultimately all four of us reached the bungalow and remained there three nights during which time we were supplied with provisions. Mr. Diggs did most of the ordering. Miss Warrington and I left the cottage once and took a walk about two blocks. Mr. Diggs and Mr. Caminetti told us not to leave the cottage under any condition. *Mr. Diggs and Miss Warrington occupied the front bed room and Mr. Caminetti and I the back bed room. Mr. Caminetti and I had sexual intercourse in that bungalow. He said he would marry me, and I believed him.*
>
> (277) *I never had sexual intercourse with Mr. Caminetti prior to the sexual relations I had with him in the bungalow. I swear posi-*

tively to that. I never had sexual relations with any man in my whole life outside of Mr. Caminetti and Mr. Caminetti knows that. He admitted that to me himself many times.''

Speaking on the subject of intoxicants, Miss Norris testified at page 287:

> ''I never had much experience in drinking intoxicating liquor before I met Mr. Diggs and Mr. Caminetti.''

This story as told by Lola Norris of her rapid transformation between the latter part of October, 1912, and the middle of March, 1913, abundantly justifies the findings of the jury that Maury I. Diggs was responsible for her transportation in interstate commerce between Sacramento, California, and Reno, Nevada. Her story is uncontradicted. It shows that the intimate relationship developed between F. Drew Caminetti and this young girl not yet twenty years of age, was of the direct procurement of Diggs himself. It was through Caminetti that Diggs effected the combination of four which resulted in the breaking up of two families and the absolute disgracing of four several homes.

PRIOR TO THE RENO TRIP FULLY TWO WEEKS HAD BEEN SPENT BY DIGGS AND CAMINETTI IN THEIR EFFORTS TO INDUCE THE WOMEN TO BECOME PARTNERS WITH THEM IN THE FLIGHT.

Two weeks were spent in argument, inducement and threatening before the two girls were finally

prevailed on to make the Reno trip in company with Diggs and Caminetti.

At page 321 Diggs himself testified as follows:

> "I saw Marsha Warrington about two weeks and one day before March 9th, on a levee at Sacramento and had a conversation with her; Marsha and I had an engagement to go out that evening in the machine and we went riding."

The conversation referred to the intimacy between himself and Marsha and the desirability of his getting out of town. In that conversation Diggs claims that he told Marsha that it was best for both of them to discontinue their relations. He said:

> (322) I guess we were talking for half an hour there, then we went home. I took Marsha home and she got out within about a block of her house and walked home alone, and upon leaving me she said I guess I won't see you any more for two weeks and I said no. * * * The next morning I called her on the telephone. She was very much surprised to know that I was still in town. * * * I think we met the next day, and had lunch together at the Peerless restaurant. I called her up a couple of times between the time on the levee and the time Mr. Diepenbrock spoke to me in O'Brien's saloon at Sacramento. It was a week before we left Sacramento."

From the Sunday preceding their departure on the midnight train until Wednesday in the middle of that week, Diggs was in hiding at a room in the Columbia Hotel in Sacramento (Rec. 327).

SUGGESTIONS OF DIVORCE AND REMARRIAGE.

In the various conversations among the four parties to the illicit relationship, the subject of divorce by Diggs and Caminetti from their wives and subsequent remarriage to the Warrington and Norris girls was frequently the topic of discussion.

With reference to this subject Marsha Warrington testified at pages 230-231, as follows:

> "Q. Just state what Mr. Diggs said to you concerning the relations which then existed and had existed between himself and his wife?
>
> A. He said they were unpleasant relations.
>
> WITNESS (continuing). He said they did not get along together at all and that he was unhappy with her, and he wanted to leave town. I had an affection for Mr. Diggs at that time. Before we took the trip he spoke to me several times concerning his relations with his wife, and said he had affection for me. He referred to this subject very often and said he cared more for me than he did for his wife and I believed he did. And he manifested it by kissing me. Marriage was also discussed between us during the two weeks prior to the trip. He said he would get a divorce from his wife and marry me.
>
> (235) During that two hours' conversation he stated that Mr. Caminetti was going along with Miss Norris. *He also said he would get a divorce from his wife, and that Mr. Caminetti would get a divorce from his wife and marry Miss Norris.*"

The same subject was referred to by this witness again at page 240:

> *"While at the bungalow Mr. Diggs promised to get a divorce from his wife and marry me,*

and Mr. Caminetti said he would do the same and marry Miss Norris."

Referring to the same subject Lola Norris testified at pages 261-2, as follows:

> "Between the date of this first event of the latter part of October, 1912, and the time the four of us left for Reno, we met three or four times a week, and I remember hearing Mr. Diggs talking about the relations which existed between himself and his wife. He said he was not very happy with his wife; he made that statement a number of times. Mr. Caminetti also told me he was not living happily with his wife; he told me several times that he and his wife had about agreed to separate. * * * Mr. Maury I. Diggs told me over the telephone on one occasion that he and his wife had positively agreed to separate and that his wife was going to apply for a divorce within a few days. This was some time before the trip to Reno. Mr. Diggs spoke a number of times in the presence of Miss Warrington about not being happy with his wife?"

No denial of the statements of these two witnesses is found anywhere in the record.

ARGUMENTS ADVANCED TO INDUCE THE GIRLS TO ACCOMPANY DIGGS AND CAMINETTI ON THEIR TRIP.

From the time of the first conversation between Diggs and Marsha Warrington on the levee at Sacramento until the time of their departure, two weeks later, the matter of flight was a frequent subject of discussion between Diggs and Caminetti and the two girls. These conversations occurred

some in the Peerless restaurant, some in the Saddle Rock restaurant and some at the room temporarily occupied by Diggs while in hiding at the Columbia Hotel.

Speaking of the Columbia Hotel meeting, Diggs himself testified at page 335:

> "During the last week ending March 9th, Miss Warrington and Miss Norris met me at the Columbia Hotel, they came up and seen me about 4 o'clock in the afternoon. I think that either Mr. Caminetti told them or I told them that I was there. I believe that I called Miss Warrington up. Miss Warrington came up there. It was in regard to our conditions. The specific arrangement was for all to come up there, whether it was on my suggestion or on Mr. Caminetti's, I have forgotten which. I told her that I thoroughly and positively made up my mind to leave town."

At page 233 Marsha Warrington testified:

> "In these conversations, including this one, *he said he would get a divorce from his wife and marry me.* I conversed with him from 2 o'clock to 5:30. *He told me about all the things that would happen if I did not go with him. Mr. Caminetti and Miss Norris were also there.*"

THE ELEMENTS OF COERCION IN THESE ARGUMENTS MADE TO INDUCE THE GIRLS TO CONSENT TO BECOME PARTNERS IN FLIGHT—THREATENED PUBLICATION IN THE SACRAMENTO BEE NEWSPAPER AND ARREST ON WARRANTS OF THE JUVENILE COURT.

In referring to the prolonged conversation held between Diggs and the two girls on the afternoon of

the Sunday on which they prepared for their departure Marsha Warrington says:

> "We were to meet at 29th and J Streets. Before meeting Mr. Diggs on that occasion Miss Norris and I *had come to the conclusion we would not go. And we both met Mr. Diggs and told him we had changed our minds about going—that we would not go.*"

These declarations were made by the two girls to Diggs on the Sunday afternoon, a few hours before their flight, though they had on the preceding day, Saturday, at the Peerless restaurant, as a result of the protracted argument there made, already concluded to go.

Continuing with reference to the Sunday afternoon conversation at the park the witness said further:

> (234) "This was at the corner of 29th and J Streets, Sunday afternoon. We then went to the park located near that place, and conversed for about two hours about the trip. We said we would not go and he said we had to go. We discussed it pro and con for two hours. He said that his lawyer had told him—he reviewed those things that he had said before, and that *the next day before the afternoon was over they would have warrants at our house and arrest us, and that their wives would prosecute us to the fullest extent of the law,* and that we would be sent to the Reform School and that everybody in town would know about it, and that *we had to go, that was all there was to it, that there was no need to argue at all.*"

At page 232 the witness Marsha Warrington, speaking of the Reno trip, said:

> "That trip was discussed every time we met during those two weeks. In addition to those matters to which I have already testified, upon these occasions when the four of us would be together, Mr. Diggs said everybody in Sacramento knew all about it, and *they were going to publish it in one of the papers, and that we would be sent to the reform school, that they had our names at the Juvenile Court, and there would be warrants out for our arrest the next day if we did not go* or rather, did not go away, and we would be put through the third degree —by the Juvenile people I suppose or by the policeman. Mr. Caminetti did not say very much he just seemed to agree with him. Miss Norris and I said we could not go."

The same witness speaking at page 235 with reference to a discussion of the matter in the Saddle Rock restaurant shortly before train-time said:

> "Went back to the Saddle Rock and met Diggs and Caminetti who were waiting for us in a box on the main floor of the dining room. This was about nine o'clock Sunday night. While we were there we were discussing where to go. Mr. Diggs said he did not know whether to go to Salt Lake, Reno or Los Angeles. They finally made up their mind to go to Reno; this was suggested by *Mr. Diggs, and they said that we would have to go now and could not back out.* There was some attempt on our part to do so. We said for them to go on but we would just as soon stay and take chances, with all that was coming out the next day. *They said no it was too late, we could not back out then.*"

Lola Norris, at pages 264-5, testifies on the same subject. After Caminetti had announced that they had concluded the best thing to do was for all four to go away, she said:

> *"I said I would not think of going.* (265) When I left Mr. Diggs he said 'Well, goodbye, you might not see me again, I might be gone to-morrow morning'; and Mr. Caminetti said that in all probability he would go too. That was on Monday night." (Less than a week before the departure.) *"I said I absolutely would not go.* There was quite a lot of talk about Miss Warrington and myself going to the Reform School if we stayed, both Mr. Diggs and Mr. Caminetti made that suggestion. I saw Mr. Caminetti almost every night that week.
>
> * * * * *
>
> "The topic discussed was about leaving home. *Mr. Diggs generally took the initiative.* They told us that the police had found out that we had been going out with them, that *our names were on the record in the police court, and that in a few days warrants were going to be issued for our arrest and we would be summoned to appear before the Juvenile Court.* They told us, they said, 'our wives know about it and would probably sue us for alienating their husband's affections,' and that also in all probability they would start actions for divorce naming Miss Warrington and me as corespondents and this, *they told us, was punishable by a term in prison.* * * * Mr. Diggs told us that his attorney had told him to take his advice and get out of town as quick as he could and take the girls with him. He often told us that Mr. Harris was his attorney. He told us every day that he was *paying his lawyer a large sum of money to keep the affair out of* (266) *the newspapers, but we always*

> *said we could not go.* The first time we agreed to go was on the Saturday before the Sunday we left, this was at the Peerless restaurant, where we were possibly two hours and a half that afternoon discussing the trip, going away."

Referring to the matter of the Juvenile Court, the same witness Norris testified at pages 244-245, as follows:

> "I also remember meeting Mr. Diggs in a hotel in Sacramento during the last week of my stay in Sacramento. I went there at his request. This was at the Columbia Hotel where Mr. Diggs was hiding in fear of being arrested. He said some policemen were after him for some fictitious check or something that he had passed."

As a matter of fact Diggs himself testified at page 350 that he was served with a warrant on the Wednesday following the Monday on which the meeting had been held in the Columbia Hotel. That warrant was in connection with his issuing a check when he had no funds in the bank to pay the same. Following arrest on the warrant Diggs had made a trip to San Francisco the day following his leaving the Columbia Hotel and spent Thursday and Friday of that week in San Francisco with his wife.

His wife on page 365 speaks of this San Francisco trip as follows:

> "I remember when my husband was away for two or three days in hiding. After he came out of hiding I accompanied him on a trip to San Francisco. We came down on Thursday

and went home on Friday. I went home with him."

The witness, Lola Norris, in speaking further on the subject of the arguments made to induce her and Marsha to make the trip, and in referring especially to the argument on the subject held in the Peerless restaurant on Saturday, testifies:

(266) "They told us that *as soon as we were served with warrants the newspapers would have a big account of it.* When we first started to discuss the subject I said I could not go, and then after we talked about it for such a long time we were finally convinced, Miss Warrington and I, that it was the only thing left for us to do, that we would have to go if we wanted to avoid a scandal. I told them I did not know how my mother would stand the shock and they said they thought she would get over it all right. Mr. Diggs said, 'It takes bullets to kill, and other people have got over things worse than that', and both Mr. Caminetti and Mr. Diggs said, 'if you think that is going to kill your parents, how do you think they will feel if you stayed home here and a big lot of notoriety and scandal comes out here, and you are in the scandal, don't you suppose they would rather have you away than have you stay here. * * * That was the first time Marsha Warrington and I agreed to go away."

Referring to the discussion of the matter on Sunday afternoon in the park, Lola Norris testified further:

(267) "After leaving Mr. Diggs and Mr. Caminetti the preceding afternoon" (when the girls had first given their consent to go) "and

meeting them on Sunday afternoon I had changed my mind about going. *Miss Warrington and I had decided the night before that we were willing to stay home and take the consequences;* and we talked it over while we were going to meet Mr. Diggs; and when we finally did meet him, we told him that we had considered it and we thought if any disgrace were likely to arise we were willing to stay home and bear it; but if they thought it was so necessary for Mr. Caminetti and Mr. Diggs to go and leave us at home *we were willing to bear any of the disgrace.* Mr. Diggs said that was absolutely foolish to talk like that, that if I were as familiar with the actual condition of affairs as he was I would not hesitate for a minute and that I would have been out of town over a week ago. He said that we were all absolutely ruined in Sacramento. * * * He said everybody would scorn us, that our former friends would not have anything to do with us, that everybody would point us out as the two girls who were connected with that Diggs affair, so he said we should go with them, and they were to get divorces and marry us. And after a two hours' conversation with Mr. Diggs we finaly agreed to go, and made an appointment to meet them at the Saddle Rock restaurant in Sacramento."

Even after this extremely reluctant consent, at the subsequent meeting in the Saddle Rock restaurant the same evening, the following happened as Miss Norris testified:

(268) "We then got on a car and rode down to the Saddle Rock restaurant, and met Mr. Diggs and Mr. Caminetti there, and remained there about two hours and a quarter, I guess. * * * Mr. Caminetti remained there about half an hour. We asked them again if they

thought it was absolutely the only way that we could avoid any notoriety and *they told us not to ask the question any more, that we had asked it enough already, that it was childish to talk about it and that they had told us enough about it.*"

Then again at the station Lola Norris wished to avoid taking the trip. At page 269 she testifies:

"I left the restaurant with Mr. Diggs and Miss Warrington; we went to the depot; we got there just about ten minutes before the train left. (10:30 P. M.)

Mr. Caminetti had not returned, then Mr. Diggs told Miss Warrington and me that we had better go with him and let Mr. Caminetti come on later. *I then said I thought I would go home and he said not to act so foolish that I had started out and that I had better come on with him as I had started in the first place.*"

(270) "I asked Mr. Diggs why he did not go alone and he said 'Why he wouldn't think of it—he thought too much of Miss Warrington and me to leave us in such a state.' * * * He went to telephone and said he found Mr. Caminetti, and said that he said that he would be at the Saddle Rock restaurant in time for the next train, to meet us there in time for the next train and leave for Reno, that train left somewhere around twelve o'clock, I think. Then the three of us went to the Saddle Rock restaurant and left just before the train left for Reno. Mr. Caminetti came just in time to get the train, then the four of us went to the depot and *Mr. Diggs bought the tickets.*"

THERE WAS NO TRUTH IN THE STORY THAT COMPLAINTS HAD BEEN MADE TO THE JUVENILE COURT OR THAT WARRANTS WERE ISSUED OR WERE ABOUT TO BE ISSUED FOR THE ARREST OF THE WARRINGTON AND NORRIS GIRLS.

Notwithstanding the persistency with which the argument was urged upon the Warrington and Norris girls that complaints had been made in the Juvenile Court involving them as defendants on criminal charges and that warrants for their arrest had been or were about to be issued, the fact is that no such complaints had been made nor had any such warrants issued, nor were they about to be served.

M. J. Sullivan, the probation officer connected with the Juvenile Court was called as a witness. He testified:

> (291) "I was probation officer during the months of February and March, 1913. I am connected with the Juvenile Court as probation officer. * * * During the month of February and March, 1913, I was familiar with very nearly all complaints made in the Juvenile Court concerning minors or concerning any other subject.
>
> Q. *Prior to the 10th day of March, 1913, had any complaint of any kind to your knowledge been made to the Juvenile Court or to any of the officials of the Juvenile Court of Sacramento County concerning Marsha Warrington or Lola Norris?* * * *
>
> (292) A. *No, sir.* * * *
>
> The policy of the Juvenile Court is to keep as much secrecy as possible in order to avoid publicity. I refused at any time to give any news to the press. *I never heard Lola Norris or Marsha Warrington's name mentioned from*

Judge Hughes, or from any other source until the articles were published in the newspapers."

The publications in the newspapers, referred to by the witness, were not made until after the arrest of the parties and the return from Reno. As a matter of fact, no complaint had been lodged with the officials of the Juvenile Court nor any warrant issued for the girls, Lola Norris and Marsha Warrington, or for either of them, prior to the Reno escapade. Yet the lodging of complaint with the officials of the Juvenile Court, or the actual or impending issuance of warrants for the arrest of the two girls were arguments most strongly urged upon them to coerce them into flight.

THERE WAS NO FOUNDATION FOR THE THREAT THAT THE SACRAMENTO BEE WAS ABOUT TO PUBLISH THE FACTS WITH REFERENCE TO THE RELATIONSHIP OF DIGGS AND MARSHA WARRINGTON AND CAMINETTI AND LOLA NORRIS.

Just as persistently as the threat of Juvenile Court proceedings and arrest was urged upon them was the suggestion made to these frightenend girls that the Sacramento Bee was about to publish the facts in connection with their illicit connection with the defendant and his associate. To set this matter at rest counsel for the government during the trial, called the managing editor of the Bee, John S. Chambers. Chambers testified:

(288) "I am the managing editor of the Sacramento Bee. * * * As such man-

aging editor I occupied or kept myself fully informed as to articles which were being published from time to time in the columns of the Sacramento Bee. I keep in touch with the various editors of the different departments and with the reporters themselves, and frequently have proofs sent to me before they appear in the paper. Before an article is published concerning, we will say, the reputation of any of the people residing in or about Sacramento, it is first submitted to me. * * * *Prior to the 10th day of March, 1913, to my knowledge, there had not been any articles prepared or written for publication in the 'Sacramento Bee' in which the names of those two girls or either of them was referred to. The 'Sacramento Bee' had not, to my knowledge, any intention, prior to the 10th day of March, 1913, of publishing any article relating to or involving Miss Marsha Warrington or Miss Lola Norris or any escapade in which it was claimed either one of these two young ladies was involved.*"

G. A. Putnam, the sporting editor of the Bee, was called as a witness for the defendant. In his examination by Mr. Devlin, he said:

(312) "I reside in Sacramento and am the sporting editor of the 'Sacramento Bee', I mean I am the editor of the sporting column. I know Marsha Warrington. I have known her for about four years, and also know Lola Norris."

The witness testified as to having advised Marsha Warrington to discontinue her relations with Diggs. He said:

"I told her what I had told her before, to lay off with this fellow. She said that she

certainly would. I saw her on Saturday, the day previous to the day she left for Reno; she rung up the office and wanted to see me. *She said that Lola Norris had come to her and said that she had heard that the 'Sacramento Bee' was about to publish a story and she asked me if that was true,*
(313) *and I said no,* that the 'Sacramento Bee's' policy was to hold out all such things as that, and they never run names and that anyway, that *nobody had a story on that subject at all* and they didn't know they were going together. This was Saturday before they went to Reno, at noon. She rang up the telephone girl and gave her her number. I told her there was not any story in the 'Bee' and that no newspaper would ever run a story about girls going with fellows. * * * She said Miss Norris was worried, she was afraid the matter was to be given publicity in the 'Sacramento Bee'—she might have said other papers, I don't know; I told her that was foolish. * * * I told her she was going out again with Diggs and she said she went out only three or four times lately with him anyhow. I told her she had better cut it out, and *I said he was not any good, and he had a bad reputation*, and if she didn't she certainly would be seen with him and it would ruin her character there in town, and also her reputation and hurt her father and her family."

On cross-examination by Mr. Sullivan, referring to his conversation with Marsha Warrington, he said:

"The conversation took place on a Saturday afternoon, the Saturday before she left. * * * I asked her again if she had gone out with him since the last time I saw her. She said yes; I told her in that conversation to stop it

because *Digg's reputation was bad. The Bee positively never intended to publish any article concerning the escapade or the conduct of Miss Warrington, Miss Norris or the defendant or Caminetti* for I was the only one in the office —no one knew in the 'Sacramento Bee' office at all about this thing, it was a surprise to everyone."

THE CONSENT OF THE GIRLS TO BECOME ASSOCIATES WITH DIGGS AND CAMINETTI IN THEIR FLIGHT WAS NOT VOLUNTARY.

As we have seen in preceding pages, Diggs started in with his arguments on Marsha Warrington to bring about her association and that of Lola Norris with him in his flight, in a conversation held with her on the levee in Sacramento two weeks before the flight. From that time on until the evening of their departure the matter had been in like manner thoroughly impressed upon Lola Norris. Both girls as we have shown in the preceding pages repeatedly and persistently declined to accompany their lewd associates in their flight.

As Marsha Warrington said at page 253:

"I went willingly after I had been scared into it."

The first time the girls consented to join in the flight was at the Peerless restaurant on the afternoon of Saturday, the day before their departure. There the same arguments which had been used by Diggs and Caminetti during the preceding two weeks were again and again impressed upon these

two young girls. They were threatened with prosecutions by their wives for alienation of affections, possibly resulting in imprisonment; threatened with warrants from the Juvenile Court involving their immediate arrest, when as a matter of fact no complaints against them or either of them had been urged upon that court, nor any warrants issued or proposed. They were threatened with publication in the "Sacramento Bee" when as a matter of fact it was neither the purpose nor the policy of the "Sacramento Bee" to make any such publication, and when, as a matter of fact, the only one connected with the "Sacramento Bee" who knew of the affair, was a friend of the two girls and had given assurance that no such publication was to be made. And yet, in the face of the consent, coerced—absolutely wrung by fabricated fear from the girls, while a condition of desperation really brought on by Diggs and his associate, Diggs' counsel urge upon this court, with seeming seriousness, the claim that both Lola Norris and Marsha Warrington were accomplices of Maury I. Diggs and F. Drew Caminetti in their violation of the White Slave Traffic Act. To us the contention seems absurd, but apparently counsel for Diggs seem obsessed by the idea that these two twenty-year old girls were actually accomplices of their associates when those two criminal associates deliberately committed the offenses denounced by the White Slave Traffic Act. These two elegant and distinguished gentlemen, in their own judgment so

immeasurably superior to the miserable mortals who engage in the vile white slave traffic, would actually have this court believe that these two young girls were their accomplices in a deliberate violation of the "White Slave Traffic Act".

INCIDENTS OF THE TRIP TO RENO.

Following the afternoon conference between the two girls and Diggs at the park, the first meeting at the Saddle Rock restaurant was held, which lasted until well along in the evening. Even at that meeting the girls again tried to recall the consent which had been extorted from them on the Saturday afternoon preceding, and again forced from them by Diggs in the park meeting earlier on that Sunday afternoon.

Poor little Lola Norris up to almost the very moment before the leaving time of the midnight train, tried to break away from the consent which had been wrung from her. To the very last the girls, notwithstanding their first consent, manifested a disposition to face the disgrace and stay with their families.

At page 236 Miss Warrington testified:

> "After Mr. Diggs, Miss Norris and myself reached the depot, the train came in and I told Mr. Diggs to go on and take the train, and that *I was perfectly willing to stay in Sacramento and would not go with him.* He said no, that he wanted me to go."

Caminetti not having been in time for the earlier train, Diggs reached him by telephone and arranged

a further meeting of the party with Caminetti at the Saddle Rock restaurant.

Speaking of this Miss Warrington testified:

> (236) "When Mr. Caminetti reached there he said he had some money and that we would go on the next train. We then left the Saddle Rock and went to the depot, reaching it about 12 o'clock. *Mr. Diggs said for us to wait and he would get the tickets; we waited and he got the tickets at the ticket office in the depot.* I waited with Mr. Caminetti and Miss Norris, then the train came and we got on. It was an ordinary Pullman car, and *Mr. Diggs got a drawing-room from the Pullman conductor and he paid for it.* We waited until it was made up, then the four of us entered. Mr. Diggs, I think, ordered the porter to make up the drawing room. There were three beds—the upper and lower berths and a little side bed. *We all went to bed right after we entered the room. Miss Norris and Mr. Caminetti had the upper berth and Mr. Diggs and I had the lower berth.* Miss Norris got in the upper berth two or three minutes after we entered the room. I think she got her clothes off up there, her shoes, her skirt, and her waist and her hat. Mr. Caminetti got in the berth the same time she did. I think he took his clothing off up there. I got in the lower berth first. Before getting into it I took off my skirt and waist and pumps. Mr. Diggs took off his shoes and coat and I think he took off his trousers and his outer shirt. * * * I saw Mr. Diggs give the tickets to the conductor."

Lola Norris' story of the incidents of the trip is shown at page 270, lines 13 to 30, and page 271, lines 1 to 12. In the main it agrees in detail with

the story as given by her friend, Marsha Warrington. In concluding it she says:

> "We reached Reno about eight or nine o'clock next morning."

At page 273 the same witness says:

> "I recall when the train reached Truckee. We arose about an hour and a half before the train reached Reno. *Upon our arising in the morning Mr. Diggs said that they would get a cottage when we got into Reno. All four of us were to live in the cottage.*"

Referring to the time of reaching Reno Miss Warrington said:

> (238) "I remained in the berth with the defendant Diggs until about eight o'clock the next morning, I think. Mr. Diggs got out first. Mr. Caminetti, I think, got out of the upper berth first. I recall reaching Reno that morning. It was before noon, I think, the first place we went was to a cafe to have our lunch. * * * Then Mr. Diggs and Mr. Caminetti went to the real estate firm, I think."

DIGGS, BY CAMINETTI'S CONSENT, WAS "BOSS" OR MANAGER OF THE MOVEMENTS OF THE PARTY ON THE TRIP.

In all things from the initial meeting in October, 1912, down to the discovery of the party of voyagers in the Reno bungalow on March 14, 1913, Diggs and Caminetti acted together in the pursuit of their common purpose,—the debauchment of these two young women.

It was especially arranged, just on the eve of their departure, that Diggs should be "boss" or

manager of the movements of the party. At page 287 the following is shown in the testimony of Lola Norris:

> "At the Saddle Rock restaurant just before leaving Mr. Caminetti gave me some money and told me to buy my own ticket to Reno. Mr. Diggs saw him give it to me, and *he said that he would buy all the tickets,* that it would never do for us to separate, and for Miss Warrington and I to go together and they go together, away from us. And he said—we had been talking about places to go, and they had suggested several places, and Mr. Diggs said it would not do for every one to have suggestions, that each one of course thought his was the best, and that *someone would have to manage the affair, somebody would have to be the boss, 'now who will it be'; and Mr. Caminetti said 'Well, I name you to be the person to manage the trip', and so he considered himself the boss.*"

SUITE AT RIVERSIDE HOTEL.

The departure from Sacramento had been made shortly after midnight of March 9-10, 1913. After lunching at a cafe the parties went to the Riverside Hotel in Reno. The girls had been directed to proceed first to the hotel while the men secured a cottage or bungalow in which they might live.

Marsha Warrington says:

> (239) "They said we should go to the hotel and wait for them and they would try and rent a house for one month at least. I think they said they were going to stay in Nevada about six months. * * * They told us that when we reached the Riverside Hotel we should wait there until they returned. They returned

about 5 o'clock. Then they registered, after which we went upstairs to the suite of three rooms, two bed-rooms with a sitting room between. We occupied these rooms just one night and left about 9:30, I think, next morning. *Mr. Caminetti and Miss Norris had one and Mr. Diggs and I had the other room.* We retired about 10:00 o'clock. *We all discarded our wearing apparel. Mr. Diggs occupied the bed with me and Miss Norris occupied the other bed with Mr. Caminetti.*"

Speaking about registering Lola Norris said at page 274:

"Mr. Diggs and Mr. Caminetti went over to the clerk's desk in the office of the hotel and reserved three rooms, a suite of rooms. Mr. Diggs told us that he *registered as Mr. Enright and wife, and Mr. Caminetti registered as Mr. Ross.* * * * There were three rooms, two bedrooms and a sitting-room. *Mr. Caminetti and I occupied one and Mr. Diggs and Miss Warrington the other. I discarded most of my wearing apparel that night.*"

AFTER THE FIRST NIGHT SPENT AT THE RIVERSIDE HOTEL THE PARTIES DURING THEIR STAY IN RENO ON TUESDAY, WEDNESDAY AND THURSDAY NIGHTS OCCUPIED ROOMS IN A BUNGALOW RENTED BY DIGGS, COMPORTING THEMSELVES AS HUSBANDS AND WIVES.

As we have seen above, while in Reno, Diggs went by the name of Enright, designating Marsha Warrington as his wife, and Caminetti went under the name of Ross, Lola Norris being also recognized as his wife.

During Monday the two men had arranged to rent during their stay in Reno, a cottage or bung-

alow. The negotiations were conducted with a man by the name of Mergen, employed by the firm of Peck, Sample & Co., real estate agents.

Mergen testified at page 200:

> "I recall negotiating with Mr. Enright on the 10th of March, 1913, for the renting of that cottage. * * * The name Enright was given me by himself. I would recognize the man again if I saw him in this courtroom.
>
> Q. Will you kindly look around and see if he is here?
>
> A. He is right there, with his hand up to his face.
>
> Mr. ROCHE. You will concede, gentlemen, that that is the defendant.
>
> Mr. DEVLIN. Yes."

At page 284, speaking of the names by which the parties were known at Reno, Lola Norris testified:

> "I knew that Mr. Caminetti went by the name of Ross at Reno and that I was going by the name of Mrs. Ross, and that Mr. Diggs and Miss Warrington were going by the name of Enright and wife."

During the several days of their stay in the seclusion of the Reno bungalow the parties comported themselves according to the names they bore respectively, as husbands and wives. Marsha Warrington said at page 240:

> "While at Reno I had sexual relations with Mr. Diggs."

At page 275 Lola Norris testified:

> "Mr. Diggs and Miss Warrington occupied the front bedroom and Mr. Caminetti and I the

> back bedroom. Mr. Caminetti and I had sexual intercourse in that bungalow. He said he would marry me and I believed him."

In her testimony given on the preceding pages of the brief, Lola Norris testified: that the first time that Caminetti ever succeeded in his purpose of having sexual intercouse with her, was in the bungalow in Reno, Nevada. It was only there, at the end of their hurried trip from Sacramento, in interstate commerce, that Caminetti finally and fully accomplished his purpose in the ruin of Lola Norris. Yet counsel for plaintiff in error Diggs exhibit what is intended to appear as a most righteous feeling of indignation because claim is made that any seduction was accomplished as a result of what they are pleased to term the "Reno escapade". It is perfectly obvious, as found by the jury, that Diggs fully intended to continue while in Nevada his relationship with Marsha Warrington on the same lines that he had established during the disgraceful debauch in his offices in Sacramento. It is likewise manifest that it was his purpose to continue the organization of the party of four until his comrade and confederate in crime, Caminetti, had finally accomplished the purpose that he had set out as early as October 7th or 8th of the preceding year, to accomplish. It is perfectly obvious, as found by the jury, that the purpose of both Diggs and Caminetti was that the two girls should cohabit as concubine and mistress with the two men and that that relationship should be maintained in what they regarded as the seclusion or privacy of the Reno bung-

alow. Certainly, while staying in Reno they comported themselves in all particulars as men and women cohabiting as husbands and wives. As Mrs. Enright and Mrs. Ross, Marsha Warrington and Lola Norris were as designated in the indictment, and as characterized in the charge of the court, mistresses and concubines to Maury I. Diggs and F. Drew Caminetti.

DISCOVERY AND BREAKING UP OF THE PARTY OF FUGITIVES ON FRIDAY, MARCH 14, 1913.

The several parties were not allowed to rest very long undetected in the supposed seclusion of their Reno bungalow. On the 14th of March, in pursuance to instructions from the Sacramento Chief of Police, Chief Hillhouse of the City of Reno, accompanied by police officer Nichols and constable Reed, and Martin Besley of Sacramento, a friend of the Warrington and Norris families, made an early morning raid on the Reno bungalow, arousing the fugitive party from their beds. By direction of the Sacramento officials, Diggs and Caminetti and the two girls were taken into custody and a little later started on their way to their home city of Sacramento.

Speaking of the coming of the officers, Marsha Warrington testified at page 240:

> "I remember the morning when Chief Hillhouse came to the house. I was just going to get out of bed. Mr. Diggs was still in bed, it was about 8:30 in the morning, I think, I remember Mr. Diggs going to the rear door when the officers came. Mr. Diggs said to me it was

> up to us whether he went to the penitentiary or not. He also said that if we were questioned by the officers, to shield them in whatever we said, and to tell them that Miss Norris and I had occupied the front room together and that Mr. Diggs and Caminetti had occupied the back room.

On the train returning to Sacramento the Assistant District Attorney of Sacramento County questioned the girls and their companions with reference to the facts connected with their flight and their stay in Reno. Subsequently the matter was investigated by the United States Grand Jury and indictments were found against both Caminetti and Diggs under the White Slave Traffic Act. The indictment against Diggs is shown at pages two to eight of the record. It was filed on May 6, 1913. The first count charges that the defendant did willfully, knowingly and feloniously, unlawfully transport and cause to be transported, and did aid and assist in obtaining transportation for and in transporting in interstate commerce from Sacramento * * * to Reno, in the State of Nevada, over the lines of railroad of the Southern Pacific Company a certain girl, to wit, one Marsha Warrington, *for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become the concubine and mistress of the said defendant.*

The second count is in substantially the same language, the transportation, however, being of the girl, Lola Norris, and the party whose concubine

and mistress she was to be, being F. Drew Caminetti.

The third count charges that the defendant did willfully, unlawfully, and feloniously, knowingly procure and obtain and cause to be procured and obtained, and aid and assist in procuring and obtaining, a ticket issued by the Southern Pacific Company at its office in the city of Sacramento * * * for passage between the city of Sacramento * * * and Reno in the State of Nevada, to be used by a certain girl, to wit, one Marsha Warrington.

It is further charged in that count that the intent and purpose on the part of the defendant was that Marsha Warrington should give herself up to debauchery and for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become the concubine and mistress of the said defendant.

The fourth count is similar in character to the third count, referring to the procurement or aid in the procurement of the ticket, the transportation being with the intent and for the purpose that Lola Norris should give herself up to debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the concubine and mistress of one F. Drew Caminetti.

The fifth count charges that Diggs willfully, unlawfully, feloniously and knowingly persuaded, induced and enticed, and caused to be persuaded, in-

duced and enticed the girl Marsha Warrington to be transported to Reno, Nevada, for the same purpose as declared in the first and third counts referring to Diggs and Marsha Warrington.

The sixth count was also for inducing, enticing and persuading, the victim of the inducement, being Lola Norris, and the purpose of the transportation being the same as alleged in the second and fourth counts of the indictment referring to Lola Norris and F. Drew Caminetti.

The case was tried before Hon. W. C. Van Fleet, United States District Judge, during the month of August, 1913, and after argument was submitted to the jury and the verdict was returned on August 20, 1913. The verdict of the jury was in this language:

> (396) "We, the jury, find Maury I. Diggs, the defendant at the bar, guilty on the first, second, third and fourth counts of the indictment, and no verdict on the fifth and sixth counts of the indictment."

The fifth and sixth counts in the indictment are those referring to inducement, enticement and persuasion.

On the 17th day of September, 1913, judgment was entered against defendant in accordance with the verdict of the jury, and he was sentenced to be imprisoned for two years in the United States Penitentiary at McNeil's Island in the State of Washington, and ordered to pay a fine in the sum of $2000.

The penalty imposed under the judgment of conviction on the four counts did not exceed the penalty which might be imposed under a conviction on any one.

Section 2 of the statute provides that a person convicted shall be punished by a fine not exceeding $5000, or by imprisonment not exceeding five years or by both such fine and imprisonment, in the discretion of the court.

Section 3, providing for a penalty for inducing, persuading and enticing, makes the penalty identical with that prescribed by Section 2.

II.

Under the Common Law Practice Which Prevails in Federal Courts, a Trial Judge Has a Right, and it is His Duty, in Charging the Jury to Express His Personal Opinions as to the Facts and Proper Inferences Therefrom, in Order to Aid the Jurors in the Intelligent Discharge of Their Duties as Triers of Fact.

One reason why in many American courts and especially in important criminal cases, there frequently occurs a miscarriage or defeat of justice, is that the trial judge in many of the state courts, by statutory or constitutional prohibition, is precluded from indicating or expressing his personal views as to the facts disclosed by the evidence before the jury. The trial judge as a rule is trained through his studies and by his practical experience in the

trial of cases, civil or criminal, so that he is better equipped than the average untrained juror in sifting and weighing the evidence submitted before him and before the jurors for final determination by the jury.

Under the common law rule of the federal courts it is one of the recognized functions of the trial judge to express his views as to the weight of evidence. Accordingly it has been observed that more efficiency and less delay in the administration of criminal justice is shown in those courts than in jurisdictions where this important function of the trial judge is not permitted to be exercised. The common law rule as recognized and followed in the federal courts is thus stated in 38 Cyc., pp. 1641-1645:

> (1641) "Charging on Weight of Evidence or as to Matters of Fact. a. View that Practice Permissible. Statement of Rule. At common law, and in the absence of any constitutional or statutory restrictions, it is not error for the trial court, in its charge to the jury, to *express an opinion on disputed questions of fact, provided such questions are ultimately left to the jury for their decision,* without any direction as to how they should find the facts. This practice prevails in the courts of a number of states, where there are no constitutional or statutory (1642) prohibitions against it, *and in the federal courts, whose powers in this respect cannot be, and are not, controlled either by state, constitutional, or statutory* (1643) *provisions forbidding judges to express any opinion upon the facts.* Where this practice prevails the opinion of the court may properly be expressed, either directly, or inferentially

through the drift of its comments and the marshaling of facts in its charge, and the exercise of its discretion cannot be reviewed unless the courts fail to submit the questions of fact to the jury without direction as to how they shall find the facts, or plainly abuses its discretion. The fact that the opinion expressed is erroneous does not alter the rule.

Whether or not a trial judge will exercise his right of expressing an opinion on the facts depends upon his judicial discretion. Unless the circumstances are exceptional, he is not bound to do so, even on request.

Whenever the judge delivers his opinion to the jury on a matter of fact, it should be delivered as mere opinion, and not as direction, and the jury should be left to understand clearly that *they are to decide the fact upon their own view of the evidence,* and that the judge interposes his opinion only to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt. Ordinarily this duty is best performed by expressly informing the jury that they are the exclusive judges of the fact, and are not bound by the opinion of the court, and it has been held error to omit to so instruct, at least where the statute expressly requires it.

(1644) On the other hand it has been held that a charge on the facts is not objectionable for failure to accompany it with a statement that the jury alone are to weigh the evidence and determine the facts, especially where that power or duty is unmistakably suggested to the jury all through the charge. And in one jurisdiction it is said that if a party fears undue influence upon the jury of what the court says in regard to the facts, he may request an instruction that the jury, and not the court, are to determine the facts.

To what extent the right of expressing an opinion on the weight of the evidence may be

exercised depends upon the discretion of the trial judge, subject to certain limitations. It is said that a trial judge may express his opinion freely on the weight and value of evidence. Very strong expressions of opinion on the facts are tolerated, indeed sometimes may be necessary; and such an expression of opinion, however decided, is not the ground of an exception, if the jury are not misled, and if no binding direction is given to the jury to find in accordance with such opinion, and *all questions of fact are fairly submitted to them to decide upon their own judgment.* If the expression of opinion is made in such a manner that the jury may naturally regard it as a direction to them, and as excluding them from finding the fact for themselves, there being evidence, proper for them to consider, both for and against such direction, this is fatal error. Moreover all comments on the evidence must be made in such a manner as not to be one-sided or unfair. Within these limitations *it is the right of the court to aid them by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction,* by directing their attention to the most important facts, by indicating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them."

In a note (No. 84), found on page 1642, many cases decided in federal courts are cited to sustain the language of the text as above quoted.

In the case of

Allis v. United States, 155 U. S. 117; 39 Law Ed. 91,

the United States Supreme Court considered this rule that prevails in the federal courts allowing the expression of opinion as to the facts by the trial judge. Counsel for plaintiff in error there objected to certain language used by the trial judge in his charge. They contended in their argument as follows:

> (Law Ed. 91) "The court, after recalling the jury, proceeded to argue to them with great energy the question of intent, a question within their province and not within that of the judge. The court and jury have separate and totally distinct offices to perform. Each should confine itself rigidly to its own sphere. The former is to decide the law and the latter the facts. * * * When a charge is argumentative, this furnishes ground for reversal if it is calculated to mislead the jury."

The opinion is by Mr. Justice Brewer. In the course of the opinion, the learned justice said:

> (Law Ed. 93) "The other errors complained of are in the charge to the jury. It appears from the bill of exceptions that after the jury had been deliberating for several hours on the case, the court called them into the courtroom and inquired if they had reached a verdict. On being informed that they had not, the court asked if there was any portion of the charge the re-reading of which would be of any assistance to them. To which question the foreman responded that a portion thereof was not fully understood by all of the jury, to wit, that in reference to the weight of the testimony of the witnesses. Thereupon the court re-read that portion. It further stated that the jury were at liberty to conduct their deliberations as they chose, but that he would call their attention

again to the part of the charge relating to the fourteenth, fifteenth, eighth and ninth counts of the indictment, and proceeded to re-read that part. In the portion re-read, after a reference to the alleged false credit of $50,000, was this language: '*And if he caused these entries to be made, with what intent did he do so?* If a customer or friend of yours who owed you $40,000 on account should come to you and tell you that he had deposited $50,000 to your credit in the German National Bank of Little Rock, and that he wanted a receipt for the $40,000 that he owed you and wanted a credit for the other $10,000, and you should give him the receipt and the credit, and should subsequently learn that he had never deposited one dollar in that bank for you, *with what intent would you conclude he had made these statements? Would you think it was with an honest purpose or with some intent to injure or defraud you?*

The bill of exceptions also contains other parts of the charge as follows:

You are not bound to be governed by any statement of the evidence made by the court, but if your recollection accords with that of the court you may accept it, and if it differs from it you may be governed by your own memory. It is your exclusive province and duty to determine the issues of fact here presented and the weight and credibility of the testimony of the witnesses, and by your determination of these questions the court will be bound. If in the course of what the court may say to you any expression of opinion should drop as to the disputed issues of fact or the credibility of the testimony of the witnesses you are not bound by any such expression, but it is your privilege to adopt or disregard it as you may see fit.

The court has reviewed the counts on this indictment and called your attention to some of

> the important evidence in the hope that this might be of some assistance to you in reaching a just verdict. There is much testimony bearing upon many of these counts that has not been called to your attention. You will consider that as carefully and as well as that which has been referred to and will remember that whatever may have been said by the court you are the exclusive judges of the questions of fact and of the credibility of the witnesses.' Closing its remarks to the jury at the time of their recall it said: 'Of course, gentlemen of the jury, you must consider all the other parts of the charge heretofore read to you also. I have simply called your attention to these four counts, thinking possibly I might assist you in arriving at a just conclusion.' "

The defendant excepted to the action of the court in recalling the jury and using the language above set forth. The Supreme Court said:

> (93) "It is now insisted that the court expressed an opinion as to the inference to be drawn from the facts, argued the question of intent to the jury and sought to coerce a verdict.* * * (94) The specific matters excepted to are: 1st, the action of the court in recalling the jury; 2nd, its arguing the testimony; 3d, its stating part of the testimony on certain points without stating the entire testimony. It is a familiar practice to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment. The time at which such a recall shall be made, if at all, must be left to

the sound discretion of the trial court, and there is nothing in the record to show that the court, in the case at bar, abused this discretion or failed to wait a reasonable time for the consideration of the case by the jury under the charge as already given.

So far as 'arguing the testimony' is concerned, the only part of the charge that can be considered as even tending in that direction was that part referring to the question of intent. We see nothing in this of which any just complaint can be made. The illustration given by the court was apt and fair, and if it bore hardly upon the defendant it was only because the transaction, of which he was charged, was one of like character and indicative of the same intent. The illustration was put in the form of a question, and no affirmation was made as to the intent that must be presumed therefrom. Even if it contained an expression of opinion such expression is permissible in the Federal courts. Simmons v. United States, 142 U. S. 148 (35:968); Doyle v. Union Pac. R. Co., 147 U. S. 413 (37:223).

So far as respects the complaint that the court stated part of the testimony on a certain point without stating all, we know of no rule that compels a court to recapitulate all the items of the evidence, even all bearing upon a single question. There was no intimation that all the testimony bearing upon any particular point was stated. On the contrary the plain declaration was that there was other testimony than that mentioned, and the jury were admonished to give that not mentioned as full and careful consideration as that mentioned.

So far as the record discloses, the charge of the court and its rulings on the trial were eminently fair and considerate of the rights of the defendant. In none of the matters referred to do we find any error, and therefore, the judgment is affirmed."

A case frequently cited on the rule here under consideration followed in the federal courts is

Reagan v. United States, 157 U. S. 305; 39 Law Ed. 709.

The second subdivision of the syllabus in that case, which is fully justified by the opinion, states the rule as follows:

> "It is not error, in a criminal trial where the defendant is a witness, for the court to instruct the jury that where the witness has a direct personal interest in the result, the temptation is strong to color or withhold the facts, and that *the deep personal interest which defendant has should be considered by the jury in weighing his evidence.*"

In the opinion of Mr. Justice Brewer, Law Ed. 710, the following is found:

> "A second objection is that the court gave this instruction: '*You should especially look to the interest which the respective witnesses have in the suit or in its result.* Where the witness has a direct personal interest in the result of the suit the temptation is strong to color, pervert or withhold the facts. The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you and you must determine how far it is credible. *The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit.*'
>
> By the Act of March 16, 1878 (20 Stat. at L. 30) a defendant in a criminal case may, 'at his own request but not otherwise, be a competent witness'. Under that statute it is a matter of

choice whether he become a witness or not and his failure to accept the privilege 'shall not create any presumption against him'. This forbids all comment in the presence of the jury upon his omission to testify. * * *

On the other hand, *if he avail himself of this privilege, his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens.* * * * The privileges and limitations to which we refer are those which inhere in the witness as a witness, and which affect the testimony voluntarily given. As to that he may be fully cross-examined. It may be assailed by contradictory testimony. His credibility may be impeached, and by the same methods as are pursued in the case of any other witness. The jury properly consider his manner of testifying, the inherent probabilities of his story, the amount and character of the contradictory testimony, the nature and extent of his interest in the result of the trial, and the impeaching evidence in determining how much credence he is entitled to.

It is within the province of the court to call the attention of the jury to any matters which legitimately affect his testimony and his credibility. * * * The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. * * * *This rule is equally potent in criminal as in civil cases, and in neither is it error for the trial court to direct the attention of the jury to the interest which any witness may have in the result of the trial as a circumstance to be considered in weighing his testimony and determining the credence that shall be given to his story.*"

Another case which recognizes the right of the trial judge to express his opinion on questions of fact which he submits to the trial jury for determination, is

Simmons v. United States, 142 U. S. 148; 35 Law Ed. 968.

In that case a jury which had been a long time engaged in deliberating on their verdict came into court and asked to be discharged from further consideration of the case. The report of the case shows the following:

> "To this request the court, after ascertaining by inquiry that the jury required no further instructions in matter of law, replied as follows: 'This case has occupied a long time. It is a case of importance, and the discharge of the jury at this time would involve another trial. It seems to me that that should not be had unless in a case of necessity. I see in this case no such necessity. I cannot understand the failure to agree arises from any difference of opinion based upon the insufficiency of the evidence in this case. *Whenever in the opinion of the court the testimony is convincing, it is the duty of the court to hold the jury together.* Therefore I must decline your request to be discharged.'
>
> The defendant excepted to the judge's statement to the jury that he regarded the testimony as convincing * * *."

The error thus charged against the trial judge is disposed of in the opinion of the court affirming the judgment, as follows:

> "The only other exception argued is to the statement made by the judge to the second jury,

in denying their request to be discharged without having agreed upon a verdict, that he regarded the testimony as convincing. But at the outset of his charge he had told them, in so many words, that the facts were to be decided by the jury, and not by the court. And it is so well settled, by a long series of decisions of this court, that the judge presiding at a trial, civil or criminal, in any court of the United States is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinions upon the questions of fact which he submits to their determination, that it is only necessary to refer to two or three recent cases in which the judge's opinion on matters of fact was quite plainly and strongly expressed to the jury as in the case at bar. Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545 (30:257); United States v. Philadelphia & R. R. Co., 123 U. S. 113 (31:138); Lovejoy v. United States, 128 U. S. 171 (32: 389)."

Lovejoy v. United States, 128 U. S. 171; 32 Law Ed. 389.

In affirming the judgment and disposing of an exception to certain language of the trial judge, expressing his opinion in that case, the court, speaking by Mr. Justice Gray, said:

(390) "It is established by repeated decisions that a court of the United States, in submitting a case to the jury, may at its discretion express its opinion upon the facts, and that such an opinion is not reviewable on error, so long as no rule of law is incorrectly stated and all matters of fact are ultimately submitted to the determination of the jury. The charge of the circuit court in the present case was clearly within the rule. Rucker v.

Wheeler, 127 U. S. 85, 93 (32:102, 105), and cases cited."

Allen v. United States, 164 U. S. 492; 41 Law Ed. 528.

The plaintiff in that case had been convicted on a charge of murder. Objection was made to the charge of the trial judge in the matter of the presumption against the accused person, growing out of the circumstances of flight.

At page 530, Law Ed., Mr. Justice Brown said:

"The 14th assignment is to the following language of the court upon the subject of the flight of the accused after the homicide: 'Now, then, you consider his conduct at the time of the killing and his conduct afterwards. *If he fled, if he left the country, if he sought to avoid arrest, that is a fact that you are to take into consideration against him because the law says unless it is satisfactorily explained,—and he may explain it upon some other theory, and you are to say whether there is any effort to explain it in this case,—if it is unexplained the law says it is a fact that may be taken into account against the party charged with the crime of murder* upon the theory that I have named, upon the existence of this monitor called conscience that teaches us to know whether we have done right or wrong in a given case.'

In the case of Hickory v. United States, 160 U. S. 408, 422 (40:474, 479), where the same question as to the weight to be given to flight as evidence of guilt arose, the court charged the jury that 'the law recognizes another proposition as true, and it is that "the wicked flee when no man pursueth, but the innocent are as bold as a lion". That is a self-evident proposition that has been recognized so often by man-

kind that we can take it as an axiom and apply it to this case.' It was held that this was error, and was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and conclusive that it was the duty of the jury to act on it as an axiomatic truth. So, also, in the case of Alberty v. United States, 162 U. S. 499, 509 (40:1051, 1056), the court used the same language, and added that from the fact of absconding the jury might infer the fact of guilt, and that flight was a silent admission by the defendant that he was unwilling or unable to face the case against him, and was in some sense, feeble or strong, as the case might be, a confession. This was also held to be *error.* But *in neither of these cases was it intimated that the flight of the accused was not a circumstance proper to be laid before the jury as having a tendency to prove his guilt.* Several authorities were quoted in Hickory v. United States, 160 U. S. 417 (40:477), as tending to establish this proposition. Indeed the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to prove his guilt. Whart. Hom., Sec. 710; People v. Pitcher, 15 Mich. 397.

This was the substance of the above instruction, and although not accurate in all its parts, we do not think it could have misled the jury."

Johnson v. United States, 157 U. S. 320; 39 Law Ed. 717-719.

At page 719 Law Ed. Mr. Justice Brewer uses this language, referring to this subject:

"Complaint is made of the instruction as to the weight to be given to the defendant's personal testimony. That instruction was in the following terms: 'The defendant goes upon the stand before you and he makes his statement;

tells his story. Above all things in a case of this kind you are to see whether that statement is corroborated substantially and reliably by the proven facts; if so, it is strengthened to the extent of its corroboration. If it is not strengthened in that way, you are to weigh it by its own inherent truthfulness, its own inherent proving power that may belong to it.'

This instruction must be taken in connection with about a page of the charge which immediately preceded it, in which the court laid down certain general rules for weighing the evidence of any witness, naming among them his bearing and conduct in the presence of the jury, his manner in giving his testimony, the character of the story told by him, its harmony or contradiction with other testimony, the opportunities the witness had for knowing the facts of which he testifies, and the motive, by reason of interest or feeling, which may influence him, saying in conclusion that 'if the interest is a very great one, if it is a very large one, it is more apt that he would be swayed—it might be unconsciously—away from the truth than if such interest did not confront him. You are simply to weigh that evidence in connection with the statements of the other witnesses in the case, whether it is the defendant or anybody else.' After these general observations follows the particular language which is objected to, but in view of that which preceded, it cannot be said that, by it, the defendant was deprived of any advantage to which he was justly entitled in having his personal statement considered by the jury. If such statement was corroborated by facts otherwise proved it was thereby strengthened; if it was not so corroborated it was still to be considered in and of itself, and in the light of 'its own inherent proving power'. Reagan v. United States, ante, p. 709."

Wiborg v. United States, 163 U. S. 656; 41 Law Ed. 289, 298.

The judgment in that case was reversed for errors in other particulars, but the rule on the subject of an expression of opinion by the trial judge is referred to in the opinion of Mr. Chief Justice Fuller, at page 298:

> "An exception was taken to the statement of the court that the men were armed. The court said: 'They were armed, having rifles and cannon, and were provided with ammunition and other supplies.' This statement was based on uncontradicted testimony, and occurring as it did in a recapitulation of the evidence, no rule of law being incorrectly stated and the matters of fact being specifically submitted to the determination of the jury, we do not regard the exception as tenable. Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 574 (34:784, 787)."

See also in this connection:

St. Louis &c. Ry. v. Vickers, 122 U. S. 360; 30 Law Ed. 116;

Spurr v. United States, 87 Fed. 708;

Southern Bell Tel. Co. v. Watts, 66 Fed. 460-467.

Many other cases might be cited to sustain this proposition, but it has been so frequently and thoroughly recognized in the federal courts that we forbear further citation on the point.

The questions discussed in this section of our argument involve certain portions of the charge of the trial judge which are attacked by counsel for plaintiff in error.

In Subdivision I at pages 14-66 of their brief they argue that certain language quoted by them on pages 15 and 16 (390-391 of the Record) and used by the trial judge in his charge, constituted reversible error. In our judgment the language used comes within the recognized rule of the right of the trial judge to express his opinion upon matters of fact. A proper understanding of the subject and a proper disposition of appellant's Point I and of our points made in this brief, numbered I and II, requires that certain other portions of the charge referring to the same general subject matter, including those which state the functions and powers of the trial jurors in disposing of questions of fact be directly called to the attention of this court.

In this Subdivision I of our argument we have discussed the proposition that a trial judge in the courts of the United States has the undoubted right to express his opinion on the facts before the jury and the inferences properly deducible therefrom. In the next following subdivision of our argument we shall take up the proposition that a defendant who voluntarily takes the stand as a witness, waives his immunity from comment on his testimony as given. Comment may also be made on his silence while on the stand when confronted with incriminating testimony as to matters presumptively within his knowledge.

The chief portions of the charge pertinent in regard to this matter are the following:

The language quoted by counsel is found in a portion of the charge set out at pages 389 to 392, as follows:

> "The evidence introduced before you by the Government, if believed by you, is sufficient in legal effect, that is, in law, to sustain the conviction of the defendant upon each one of the several counts of the indictment, but whether it is such as to satisfy you of its truth and establish the guilt of the defendant to the degree I have indicated is, as I have heretofore stated, *a question solely for your consideration. The evidence is all before you, and it is for you to say where the truth rests.* The defendant has taken the stand in his own behalf, and, so far as his testimony tends to cover the transaction involved in the charges against him, *it is somewhat at variance with that of the two girls,* Miss Warrington and Miss Norris; that is, according to his story of their intimacy, he makes it appear that Miss Warrington was apparently pursuing him as much as he was pursuing her, if not more, and he claims that when he suggested (390) the idea of leaving Sacramento alone she protested that she should not be left behind, but should go with him; and that it was she, and not the defendant, who insisted that Miss Norris should accompany them. *Now this conflict so far as it exists, is for you to determine; that is, you will say whether the statements of these girls are true, or that of the defendant,* to the extent that you find it material to determine in order to reach your verdict. *The testimony of the defendant, however, does not cover the entire transaction as testified to by the two girls and the other witnesses for the prosecution.* After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the Government tends to

show the trip to Reno was taken, *he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with which that trip was taken, contenting himself by merely referring to it as having been taken,* and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. *But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration.* A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but *where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances* in reaching their conclusion as to his guilt or innocence; since *it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so.*

If you find that these girls were taken to Reno by the defendant and his companion Caminetti in the manner charged, then the only question remaining is as to the intent with which they were so taken. As to this question,

if the evidence of the defendant and his witnesses as to the reasons actuating him in leaving Sacramento, and the intent he had in mind, is not such as appeals to your hard, practical reason and common sense, in the light of the other evidence and when all his acts are considered, you are not compelled to believe it, no matter how strongly asserted. There is a homely adage that actions speak louder than words; and the truth of this is quite as pertinent in its application to judicial inquiries as in the ordinary affairs of life. Therefore, if you find that these girls were taken to Reno on the occasion in question as testified to by them, and that while there the defendant and his companion Caminetti cohabited with them, as the testimony tends to show, then you may find that they were taken there with the immoral purpose and intent charged. That is, if the declarations of the defendant as to his intent and purpose do not accord with his acts you may discard his words if they do not carry conviction to your minds, and base your finding as to his intention upon the acts committed by him.

And even if you find that the defendant and his companion Caminetti were actuated in their (392) departure or flight from Sacramento by a fear of exposure or arrest, but that nevertheless in taking these two girls with them there existed the intention to subject them to the immoral purpose charged, the defendant is guilty. If that immoral purpose was one factor inducing him to leave Sacramento and take these girls with him, it matters not that he may also have been actuated by his fears or other consideration moving him to take that trip. He would nevertheless be guilty.

Now, gentlemen, with these suggestions, I submit this case to you. My duty is finished, and the issue rests with you."

CHARGE AS TO SPECIFIC INTENT.

At pages 378-379 the trial judge instructed the jury on the subject of specific intent in the language following:

> "You will observe that in each count of the indictment the specific purpose and intent of the defendant in committing the particular criminal act therein charged is alleged. The existence of the intent so alleged is made essential under the statute to constitute an offense, that is, that the act be committed to accomplish the immoral purpose denounced. It is therefore essential to the guilt of the defendant under any one of these counts that this intent be made to appear. That is one of the substantive elements necessary to constitute a violation of the law in question. The intent or purpose with which a given act is committed, however, need not be shown by any open declarations of the party charged that such was his intent. It may be deduced from the circumstances shown in the evidence, including all the acts done or statements made by the defendant, either orally or in writing, and by the acts and declarations in his presence of those, if any, concerned with him in carrying out the transaction. In other words, it is to be gathered by the jury from those sources by applying their reason and judgment to the evidence and making the deductions therefrom which men of ordinary experience and observation in the affairs of life would naturally draw. When the intent is thus made manifest, and the jury are able to so find, it satisfies the law and is sufficient, if the other elements are shown, to sustain guilt. Indeed if such were (379) not the law it would be rare that the specific intent of a defendant in doing a particular act could be established. Men committing a wrongful act do not ordinarily pro-

claim in any open, definite manner the real purpose or intent with which the act is done, and therefore unless it could be inferred from the circumstances surrounding it, the real intent could in most instances not be established.

CREDIBILITY OF DEFENDANT AS A WITNESS.

At pages 384-385 the court instructed the jury as to the proper method of weighing the testimony of the defendant as a witness, in the language following:

> "*Where a defendant takes the witness stand, his evidence is to be judged by the same rules which are applied in determining the credibility of any other witness. That is, he is not to be discredited merely upon the ground that he is the defendant. You are to accord him the same fair and impartial consideration of his evidence, when viewed in the light of all the other facts in the case, as you would the testimony of a witness standing in any other relation to the case;* but in passing upon the evidence of a defendant you have a right, precisely as with any other witness, to *consider the interest he has in the result of the trial,* and determine for yourselves how far that interest may have tended to color his evidence or cause him to deviate from the truth. You will understand from this merely that while there is no presumption against the truth of the evidence of a defendant any more than that of any other witness, nevertheless you are entitled to consider the interest he necessarily has in the result of the trial and determine to what extent it may have tended to affect his testimony before you. If, when tested by these rules, it does not accord with your reason as being true, then you are not required to believe it."

As we have seen in the language above quoted from the charge, the jurors were advised that the testimony of the defendant witness was to be *measured by the same rules as the testimony of other witnesses.* The jury were instructed on the subject of the credibility of witnesses generally in this language of the charge found at pages 383-384 of the record.

> "In determining the credibility of a witness you will bear in mind that every witness is presumed to speak the truth; but this presumption may be overcome by the manner in which he testifies or the character of his testimony. The jury should take into consideration his character and conduct as disclosed, his relation to the controversy and to the parties, if any, his expressed or apparent bias or partiality, the reasonableness or unreasonableness of the statements he makes, and all other elements which tend to throw light upon his credibility. *The manner of the witness upon the stand is to be observed,* and the testimony he gives tested by the rules of reason and common sense. You note how far his evidence accords with the other facts as proven in the case; how far it is inconsistent with those facts, how far it is probable or improbable in itself or when viewed in the light of the other evidence on the question as to which the evidence of the witness has been addressed, and from all these considerations you determine the weight which you will give to the testimony of any witness. The fact that a witness appears to be merely mistaken as to some feature of his evidence does not necessarily discredit him in other respects, (384) although it may properly make you more careful in the consideration of the rest of his testimony; but if a witness comes upon the stand and testifies to what you believe, in view

> of the other evidence in the case, to be a deliberate falsehood, uttered with an intent to deceive, then you have a right, in your wisdom, to discredit all his testimony and to discard it from your consideration, unless the other evidence in the case satisfies you that in some respects he has told the truth. *This applies to all the witnesses alike.*"

The jury were thoroughly advised as to the relative functions to be discharged by the trial judge and by the jurors—they were fully advised that the ultimate determination of the facts was to be made by them rather than by the trial judge.

At pages 382-3 is found a portion of the language used by the trial judge with reference to the rule that the ultimate determination of the facts of a case must rest with the jurors as the triers of the facts, as follows:

> "While, as I have stated, it is the duty of the court to declare the law, and that of the jury to be governed by it in their consideration of the evidence, *it is, on the other hand, the province and right of the jury to pass upon the facts in the case and the credibility of the witnesses. With those functions the court has nothing to do,* other than to endeavor to see that only proper evidence is permitted to go before the jury for their consideration; and *it is neither the province nor the disposition of the court to intentionally interfere with that duty of the jury. If, therefore, during the progress of this trial you have gathered any impression from anything which the court may have uttered in your presence, as to the views or judgment of the court on the question of the defendant's guilt or innocence, or as to the weight of any evidence or the credibility of any witness, you*

will disregard such impression, should it not accord with your own views, and base your finding upon your own independent judgment as to what the sum of the evidence discloses; and when I refer to the evidence I refer solely to such evidence as has been finally permitted to go in and remain before you for your consideration. Any evidence that during the course of the trial has been primarily admitted in evidence and thereafter withdrawn is out of the case for any purpose for your consideration. And *in this connection, as requested by counsel for the defendant today during an incidental argument, I should suggest to you, gentlemen, that the statements or declarations of counsel made at the bar are in no sense evidence for your consideration. You are to confine your consideration alone to the evidence that has been admitted before you from the witness-stand or in the way of exhibits or other physical evidence which may have gone in before you.*"

THE UTTERMOST OFFENDING OF JUDGE VAN FLEET AND GOVERNMENT COUNSEL.

The main burden of the complaint made by plaintiff in error against the trial judge and counsel for the government is that they each and all assumed and stated in the presence of the defenseless jurors that they, in passing upon the evidence of the case for the purpose of their ultimate finding as to the facts, had a right to take into consideration the failure or the omission of the defendant when on the stand to deny or explain the incidents of the Reno trip or to make any direct statement of the intent or purpose with which that trip was taken.

All adjudicated cases, even those which hold most strongly in favor of accused persons appealing from judgments of conviction, recognize the established rule that reversal for the expression of opinions as to the facts by a trial judge or comment by a judge or counsel as to the silence of a defendant sworn at his own volition as a witness is justifiable only where the conduct of court or counsel constitutes a substantial prejudice to the rights of the defendant.

In order that the conduct challenged on the part of court or counsel may amount in the eyes of an appellate tribunal to a ground for reversal, it is incumbent on plaintiff in error to show that the conduct challenged resulted in establishment in the minds of the jurors—the triers of facts—of views or impressions as to those facts which otherwise might not be entertained by the jurors. If the action of the court or of counsel accomplishes no other impression on the mind of the jurors than that definitely fixed therein by unquestioned evidence in the cause, there can be no resulting injury. If there be no injury—no prejudice—there can be no reversal for such conduct of court or counsel.

What possible injury is shown by this record to have resulted from Judge Van Fleet's expression of opinion as to the presumption of fact arising from the defendant's significant silence on the stand as to the incidents of the Reno trip? Diggs himself testified at page 348, without any objection whatever from his counsel: "We left for Reno two weeks after meeting her on the levee."

At page 358 he was asked what was meant by the Reno trip? Some objection was made to the question on the ground it was not proper cross-examination. His answer to the question was:

> "A. It is perfectly evident what trip it was.
> Mr. SULLIVAN. Well, what do you mean? The trip that you and Caminetti and Miss Norris and Miss Warrington took from Sacramento to Reno?
> (359) A. Yes, sir, the trip I took to Reno; yes, your Honor. I took but one trip to Reno in March, 1913.
> Q. And on that trip were you accompanied by Mr. Caminetti, Miss Norris and Miss Warrington?
> A. They were along, yes."

It was to the Reno trip and the incidents thereof and the purpose with which it was made that Judge Van Fleet addressed that portion of his charge from which a fractional sentence is taken and placed in the heading of Subdivision I of the argument of counsel for plaintiff in error, at page 14.

We have above called attention to portions of the charge in which that fraction of a sentence is found. Let us analyze that section of the charge and see what the trial judge really did say. What was the actual extent of his exceeding great offending? The portion of the charge referring to this matter begins on page 389 with this preliminary suggestion: "The evidence is all before you and *it is for you to say where the truth rests.*" Furthermore, in this cautionary way which characterized the conduct of the judge all through his charge, he said, after calling

attention to the conflict between the testimony of the two girls and that of defendant Diggs:

> "Now, *this conflict, so far as it exists, is for you to determine. That is you will say whether the statements of these two girls are true or that of the defendant,* to the extent that you find it material to determine in order to reach your verdict."

Let us see whether the trial judge in this portion of his charge misstates any matter of fact. In the first place, after the initial sentence above quoted by us in which the jurors were advised of their absolute right to determine the facts, he says: *"The defendant has taken the stand in his own behalf."* There is here neither misstatement of facts or of law.

> "In so far as his testimony tends to cover the transactions involved in the charges against him, it is somewhat at variance with that of the two girls, Miss Warrington and Miss Norris; that is, according to his story of their intimacy he makes it appear that Miss Warrington was apparently pursuing him as much as he was pursuing her, if not more, and he claims that when he suggested the idea of leaving Sacramento alone she protested that she should not be left behind but should go with him; and that it was she, and not the defendant, who insisted that Miss Norris should accompany them."

In this language of Judge Van Fleet there is neither misstatement of fact nor any misstatement of a rule of law. The defendant certainly took the stand voluntarily. His statement of the reasons for the Reno trip certainly is at variance with that

as given by the girls. In Judge Van Fleet's reference to that matter there is neither misstatement of fact nor of law. That Diggs insisted that Miss Warrington was the one who insisted on Lola Norris accompanying the others on the trip is beyond all question of fact. The reference to it contains no misstatement of any rule of law.

There certainly was a conflict between the testimony of the two girls and that of Diggs. On that subject there was, on his part, *an absolute statement of his position rather than silence or failure to explain his attitude.*

When Judge Van Fleet advised the jury that this matter of conflict was to be settled by them he stated that to which no one can take any just exception.

Following the language quoted, Judge Van Fleet says:

> (390) "*The testimony of the defendant, however, does not cover the entire transaction as testified to by the two girls and the other witnesses for the prosecution.*"

This is certainly a statement of a matter of fact clearly within the judge's proper function and not a statement of any matter of law. As a matter of fact Diggs testified to nothing occurring after the time they reached the Sacramento station and before they reached their Reno destination. The judge next says:

> "After testifying to the relation between himself and Caminetti and these girls down to Sunday night on which the evidence of the Government tends to show the trip to Reno was

> taken, *he stops short and has given none of the details or incidents of that trip, nor any direct statement of the interest or purpose for which that trip was taken, contenting himself by merely referring to it as having been taken and by testifying to his state of mind for some days previous to the taking of that trip.*"

In this language there is neither misstatement of fact nor misstatement of any rule of law appropriate to the fact under consideration.

After referring to the limitation of cross-examination of the defendant as a witness, the court next said:

> "But in passing upon the evidence in the case for the purpose of finding the facts *you have a right to take this omission of the defendant into consideration.*"

The matter directly involved in this sentence taken from the charge will engage our attention in the next subdivision (II) of the argument.

This portion of the charge is in this language:

> "A defendant is not required under the law to take the witness stand. He *cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact,* nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but, *where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness.*
> (391) and if his failure to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, *such failure may not only be com-*

mented upon but may be considered by the jury with all the other circumstances, in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

The judge stated the law when he said that a defendant is not required under the law to take the witness stand. No exception can be taken to that. He next said, "He cannot be compelled to testify at all." That is a correct statement of the law.

The next suggestion was, "If he fails to do so no inference unfavorable to him may be drawn from that fact." That language certainly is law.

> "Nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence."

The language quoted is clearly law.

> "*But where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness.*"

That language is clearly law, as we shall show more directly in the next following subdivision of our argument.

The judge continues:

> "*If he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence.*"

In connection with this language we ask the court to bear in mind that the "acts of an incriminating nature" in connection with the Reno trip must refer under the facts of the record to *Diggs' purchase of the train tickets* testified to by both girls, and *his purchase from the Pullman conductor of the drawing room for their transport to Reno* and of *the occupancy by himself and Marsha Warrington of the lower berth and the occupancy by Caminetti and Lola Norris of the upper berth during the transit and the conversation occurring on the train and long before reaching Reno as to the intention of Diggs and Caminetti to secure a cottage or bungalow in Reno wherein they might live during their stay in Reno.* No sane, human mind can doubt, under the evidence of this record, that *Diggs purchased the tickets.* No sane, human mind can doubt that Diggs *secured the drawing room, for the use of the party of four under his charge as "boss" or manager.* No sane, human mind can doubt that before reaching Reno and between their time of arising at eight o'clock in the morning and the time of reaching the state line, that *he and Caminetti, in the presence of the two girls, had discussed their intention of securing an abiding place for these birds of passage during their stay in Reno.* Before they had secured their temporary domicile in the Riverside Hotel they had already hunted out a real estate office and made their preliminary negotiations for securing the bungalow. As to these facts there can be no question. As to the finding of the

jury with reference to these facts, no possible injury or prejudice could have resulted from any language of the trial judge in the course of his charge, to which we have above called attention.

Following the language last above quoted from this section of the charge, Judge Van Fleet used the language incorporated by counsel in their heading of Subdivision I of their argument:

> "And if he has failed to deny or explain *acts of an incriminating nature* that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury, with all the other circumstances, in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

The *"acts of an incriminating nature that the evidence of the prosecution tended to establish against him"* in connection with the trip to Reno, were the acts above referred to,—*the purchase of the tickets, the purchase of the Pullman accommodations, the occupancy of the same drawing room and the preliminary arrangements for the securing of quarters for the party of four while in Reno.*

We insist and shall argue in the next subdivision of this brief that *the silence of defendant as to the several incriminating facts just noted was clearly a matter to which the trial judge had a right to call the attention of the jury, and clearly a matter to which counsel for the government had a right to refer in their argument.* Certainly these facts as

to which there was positive testimony by the government and no denial by the defendant were matters which according to every theory of law or fact might properly be taken into consideration by the jury in arriving at their conclusion as to the guilt or innocence of defendant.

But the language to which counsel most seriously invite attention is

> "It is a legitimate inference that could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

The portion of the charge in which the trial judge, by virtue of his prerogative, called attention to the failure of the defendant to testify while on the stand, bore directly upon the question of guilty criminal intent in making the trip from Sacramento to Reno. The circumstances of that trip, as testified to by the trainmen and by the two girls, were competent and highly persuasive evidence to establish that the purpose of Diggs, as well as that of Caminetti, in making the trip, was that these two girls should abide with them while in Reno as their mistresses or concubines. The conduct of Diggs while on the trip, as testified to by the girls, was proper to be taken into account by the jury in ascertaining as an ultimate fact, what was the actual purpose of Diggs in making the trip. Diggs was a witness in his own behalf. His testimony as given was for the purpose of denying any such intent in making the trip as that ascribed to him by the government.

Being on the stand, the facts testified to by the girls and the train men being matters of the utmost importance to him, in connection with the question of guilty intent, it was the most natural thing in the world to expect that while a witness and while on the stand, if the matters testified to by the girls and the train men were not true, that he should have denied them. It was a natural inference or presumption from such a failure to deny that no denial could truthfully be made by him. It was a presumption or inference from the facts before the jury, properly deducible therefrom, to which the trial judge had the absolute right to call the attention of the jury in order to aid them in a proper determination of the questions submitted to them.

III.

Diggs, the Plaintiff in Error, Having Voluntarily Taken the Witness Stand, Waived All Immunity. His Silence, as Well as His Testimony and Conduct, Were Legitimate Subjects for Criticism and Comment by the Court and Counsel for the Government.

At pages 14 to 66 of their brief, in Subdivision I of their law argument, counsel for plaintiff in error discussed the proposition thus stated on page 14:

> "The trial court erred in charging the jury to the effect that if he (defendant) has 'failed to deny or explain acts of an incriminating nature, that the evidence of the prosecution tends to establish against him, such failure may not

> only be commented upon, but may be considered by the jury with all the other circumstances, in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference that could he have truthfully denied or explained the incriminating evidence against him, he could have done so."

The point thus stated and argued at the pages indicated in the Diggs brief, is the same as Point III urged by counsel for Caminetti in the companion case, shown at pages 85 to 146 inclusive, of their brief. The questions presented in the briefs of the two plaintiffs in error, at the points indicated, have been heretofore discussed by us in our reply to the Caminetti brief, at pages 73 to 90, in Subdivision IV of our argument. The two cases are based on substantially the same facts, involve the same parties, involve identical questions of law, and have been argued together in this court. Under those circumstances, we deem it proper, instead of extending the quotations made from the several authorities cited by us in our brief in the Caminetti case, to call attention to the pages of that brief at which authorities have been cited and quotations made therefrom. In this way we may, to some extent, lighten the labors of the court and lessen the volume of our argument.

The criticism made in both briefs of the language of the trial judge is based mainly on the case of

Balliet v. United States, 129 Fed. 689, 696.

That case is said to sustain the doctrine that the trial court, in the language quoted by counsel on

pages 15 and 16 of their brief, committed reversible error. In our judgment the Balliet case lays down no such doctrine. If it asserts the doctrine claimed by counsel and is the leading case on the subject, it is somewhat remarkable that it has never been at any time cited by any federal court as sustaining the doctrine here contended for by plaintiffs in error. It certainly does not repudiate the doctrine of the long line of cases cited in the preceding subdivision of our argument, holding that it is the duty, as well as the privilege, of the trial judge, in a jury case, to state his views or opinions as to the facts to be determined by the jury, *if he finally leaves the determination of those facts in the hands of the jurors themselves.* As we have shown in the concluding pages of the preceding subdivision of our argument, the trial judge fully, clearly and repeatedly advised the jurors that *whatever his views as to the facts might be, whatever expression he might have given to his opinions on the subject before the jury, they should finally determine all such matters for themselves. He fully instructed the jury that the burden of proof was upon the government.* He instructed the jurors further that the *testimony of the defendant who had taken the witness stand was to be measured in the same way as the testimony of other witnesses whose testimony was before them.* He did tell them, it is true, as claimed by counsel, that in weighing his testimony they might take into consideration the fact of which they were perfectly conscious, that while on the stand the defendant

maintained an absolute silence as to the events occurring on the train between the time they left Sacramento shortly after midnight, and the time they reached Reno next morning. He stated what is generally recognized as the law in these United States, that *the silence or failure of defendant, while on the stand, to explain or deny incriminating circumstances shown by the testimony of the prosecution, was a circumstance to which they might give weight in passing on the testimony.* He further said *"It is a legitimate inference that could he have truthfully denied or explained the incriminating evidence against him he would have done so".* In giving that advice to the jury he stated a rule generally recognized in American courts. The *Balliet* case does not repudiate that rule. The immunity from criticism or comment on the action of a defendant testifying on his own behalf in a criminal trial is supposed to arise under the statute of March 16th, 1878 (20 Stat. L. 30) which provides:

> "In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors in the United States Courts * * * the person so charged shall, at his own request but not otherwise, be *a competent witness. And his failure to make such request shall not create any presumption against him."*

At pages 81-3 of our Caminetti brief we called attention to the case of

> *Fitzpatrick v. United States,* 178 U. S. 304, 316; 4 L. Ed. 1083.

An extended quotation from that case is found on the pages indicated. In the quotation, at page 83, appears the following:

> "While the court would probably have no power of controlling an answer to any question, *a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury.* (State v. Ober, 52 N. H. 459); and it is also held, in a large number of cases, that *when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses.*"

At pages 74 to 77 we called attention to

> *State v. Ober,* 52 N. H. 459; 13 Am. Rep. 88, 91.

We ask attention of the court to the quotation there made by us from the *Ober* case. In the opinion, criticism is made of the language of Judge Cooley in his work on Constitutional Limitations (p. 317). On pages 76-77 of our Caminetti brief, we called attention to a note following the report of the case found in 13 Am. Rep. The reporter there calls attention to a note in the third edition of Judge Cooley's work on Constitutional Limitations, referring to the *Ober* case. In the 7th edition of the same work, page 449, we find a note in this language:

> "In State v. Ober, 52 N. H. 459, 33 Am. Rep. 88, the defendant was put on trial for an illegal sale of liquors, and having offered himself as a witness was asked on cross-examination a question directly relating to the sale. He declined to answer *on the ground that it might*

tend to incriminate him. Being convicted, it was alleged for error that the court suffered the prosecuting officer *to comment on this refusal to the jury. The supreme court held this no error. This ruling is in entire accord with the practice which has prevailed without question in Michigan, and which has always assumed, that the right of comment where the party makes himself his own witness and then refuses to answer proper questions, was as clear as the right to exemption from unfavorable comment when he abstains from asserting the statutory privilege.*

* * * * *

"Under the Michigan practice, when the court had decided the question to be a proper one, it would have been left to the defendant to answer or not, at his option, *but if he failed to answer what seemed to the jury a proper inquiry, it would be thought surprising if they gave his imperfect statement much credence.*

"On this point see further, State v. Wentworth, 65 Me. 234; 20 Am. Rep. 688."

It will be observed that Judge Cooley here recognizes the distinction between *compelling a defendant on the stand to answer a question,* and thus afford evidence against him, and *commenting on the fact that while voluntarily on the stand as a witness he failed or declined to testify on a matter pertinent to the issues involved.* He distinctly recognizes that the *imperfect or partial statement* of a witness could not claim the same credit in the minds of the jurors as *a complete statment* on the same subject.

As we have seen Cooley's footnote cites

State v. Wentworth, 65 Me. 234; 20 Am. Rep. 688.

After a review of the authorities on the subject it was held in that case, as shown by the syllabus, that:

> "The defendant, in a criminal prosecution, became a witness at his own request. Held
>
> (1) That he thereby waived the constitutional provision that an accused person shall not be compelled to give evidence against himself;
>
> (2) That he could not refuse to answer questions put on cross-examination to discredit his direct evidence, on the ground that answering would incriminate himself; and
>
> (3) That privilege from answering questions on the ground that they tend to criminate the witness is the privilege of the witness and not of his counsel."

The *Ober* case is cited in the *Wentworth* case as one of the authorities sustaining the position taken by the court. We shall now call attention to a number of authorities cited by us in our former brief, and the pages of that brief at which they will be found.

12 Cyc., pp. 576-7, quoted on pages 73-4.

Wharton's Criminal Evidence, Sec. 681, quoted on page 74 of our Caminetti brief.

State v. Ober, 52 N. H. 459; 13 Am. Rep. 88-91, pages 74-7.

Stover v. The People, 56 N. Y. 315, quoted at pages 77-9.

People v. Mead, 145 Cal., quoted at page 79.

People v. Wong Bin, 139 Cal. 65-6, shown at pages 79-80 of our Caminetti brief.

State v. Harrington, 12 Nev. 129-131, shown in former brief, pages 80-81.

U. S. v. Fitzpatrick, 178 U. S. 304, 316; 44 L. Ed. 1083, shown at pages 80-83.

We call attention to a short portion of the excerpt from the opinion in the *Fitzpatrick* case, given by us at pages 82-3.

> "Where an accused party waives his constitutional privilege of silence, *takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime.* * * * Indeed, we know of no *reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses are.* * * * While the court would probably have no power of compelling an answer to any question, *a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury* (*State v. Ober,* 52 N. H. 459)."

At pages 83-4, we called attention to the case of

Powers v. United States, 223 U. S. 303-316; 56 L. Ed. 448.

At pages 84-5 we called attention to

Sawyer v. United States, 202 U. S. 150, 168; 50 L. Ed. 979.

At page 85 we called attention to

Cotton v. The State (an Alabama case), reported in 6 So. 372.

The doctrine laid down in that case was thus stated:

> "Where defendant elects to become a witness in his own behalf, *his failure to explain criminating circumstances is a matter to be considered by the jury, and he is not protected from the criticism of the state's counsel* by Crim. Code Ala. sec. 4473, providing that his failure to become a witness shall not be a subject of comment by counsel."

On the same page (85) of our Caminetti brief we cited *Graves v. State,* decided by the Supreme Court of Alabama, 7 So. 317; and *Clark v. State*, 78 Ala. 474.

At pages 85-6 we called attention to *State v. Glade,* decided by the Supreme Court of Kansas, 33 Pac. 8.

At pages 88-90 we called attention to the language of the judges in the Balliet case, for the purpose of showing that the question there presented was not the same question as that here under consideration. The Balliet case makes no attempt at disturbing the recognized doctrine that a federal trial judge has a right to express his views as to matters of fact in the presence of the jurors, in order to aid them at arriving at an intelligent solution of the questions submitted to them for consideration.

The Balliet case does not rule that a presumption or inference of fact does not arise in the case of a defendant witness, who, while on the stand, remains silent in the face of inculpating or incriminating evidence. The criticised language of the Balliet decision is not the language here. The Balliet charge

as a whole is not before us. The language quoted by counsel and set out in the opinion of the court, taken with what surrounded it in the charge may have been misleading or confusing on the subject of *material facts* or *burden of proof*. Here the language is absolutely clear and is neither misleading nor confusing.

The incriminating circumstances with reference to which the silence of the defendant might be taken into account in the Diggs case were clearly pointed out by the trial judge and the matters as to which Diggs remained silent are directly indicated by him. The silence of the witness with reference to those incriminating circumstances being called to the attention of the jury it was clearly within the function of the trial judge to state that "could he have truthfully denied or explained the incriminating evidence against him he would have done so." The law on the subject of the burden of proof was elsewhere and properly called to the attention of the jury. The facts material to be considered by the jurors in arriving at their conclusion were also likewise thoroughly called to the attention of the jury in other portions of the charge.

As claimed in our former brief, the general trend of American authority—the practically unanimous holding of our American courts—is to the effect that it is proper for a judge or prosecuting counsel to comment on the testimony of the defendant witness who has failed to explain incriminating circumstances shown by the government in the case presented against him.

We ask attention to a few additional cases stating this same general doctrine. The matter is discussed in

4 Wigmore on Evidence, Sec. 2276.

After referring to the distinction between a defendant and an ordinary witness on the stand, the author thus refers to the defendant sworn as a witness in a criminal cause:

> "The case of an *accused* in a criminal trial, who *voluntarily takes the stand, is different.* Here his privilege has protected him from being asked even a single question, for the reason that *no relevant fact that could be inquired about would not tend to criminate him* (ante, Sec. 2260). On this very hypothesis, then, his *voluntary offer of testimony upon any fact is a waiver as to all other relevant facts because of the necessary connection between all.* His situation is distinct from that of the ordinary witness, with reference to the point of time when a waiver can be predicated, because the ordinary witness is compelled to take the stand in the first instance, and his opportunity for choice does not come until later when some part of the criminating fact is asked for; while the accused has the choice at the outset. * * *
>
> Now the accused knows that there must always be such a connection; but in the witness case there may or may not be such a connection, and if there is not, then his answer cannot be a waiver. *The result is, then, that the accused, as to all facts whatever* (except those which merely impeach his credit and therefore are not related to the charge in issue) *has signified his waiver by the initial act of taking the stand."*

Heldt v. State, 20 Neb. 492; 30 N. W. 626.

Subdivision 5 of the syllabus is in this language:

> "If a person accused of crime testify in his own behalf, he is to be treated as any other witness; and *if he fails to deny a material fact which has been testified against him, the district attorney may comment upon such omission in his argument to the jury.*"

In the opinion (pp. 629-30) Mr. Chief Justice Maxwell uses this language:

> "The plaintiff testified as a witness in his own behalf very fully, and denied making the alleged confession. *He did not, however, deny that he had committed the offense with which he was charged.* The district attorney, in his argument to the jury, commented upon this omission, and this is now assigned for error.
>
> 'This question was before this court in Comstock v. State, 14 Neb. 205 (S. C.) 15 N. W. Rep. 355, and it was held that when a prisoner testifies in his own behalf, and fails to contravert what has been said by witnesses against him concerning a fact within his own personal knowledge, it is in the nature of an admission of the truth of such fact. The failure to contradict such fact may, no doubt, be open to explanation. The general rule is that if the accused testifies as a witness he is to be treated as any other witness. Boyle v. State, 5 N. E. Rep. 203; Thomas v. State, 2 N. E. Rep. 808; Com. v. Nichols, 114 Mass. 285; State v. Ober, 52 N. H. 459, 13 Am. Rep. 88; Connors v. The People, 50 N. Y. 240. There was no error, therefore, in the comments of the district attorney'."

See in this connection

Brandon v. The People, 42 N. Y. 265-9;

Lee v. State, 56 Ark. 4; 19 S. W. 16.

Subdivision 3 of the syllabus is in this language:

> "Where defendant was sworn in his own behalf, *though he confined his testimony to the single question of self-defense, he thereby became a witness in the case, and Act March 24, 1885, sec. 1, which provides that the failure of one charged of crime to testify in his own behalf shall not create a presumption against him, does not prevent the prosecuting attorney commenting on defendant's failure to deny certain testimony in relation to facts of which he must have had knowledge.*"

In the opinion of the Chief Justice, pages 16-17, S. W. Rep., the following discussion of the subject is found:

> "The defendant testified in his own behalf, but confined his testimony to a single fact, tending to sustain his theory of self-defense. One of the attorneys for the prosecution, in his argument to the jury, commented upon the defendant's failure to deny the testimony of two witnesses for the state, to the effect that he had made a statement the day of the homicide indicating a desire for an opportunity to kill the person for whose death he was upon trial. It is argued that this is prejudicial error, for which the judgment should be reversed. Acts 1885, p. 126. But *the exemption from unfavorable comment upon the silence of a defendant in a criminal cause extends only to one who does not avail himself of the statutory privilege of testifying in his own behalf. If he takes the stand, he is upon the same footing as any other witness.* McCoy v. State, 46 Ark. 141. When he has exercised his option to become a witness, he is made competent for all purposes in the case, and, *as was said by the supreme court of Maryland in a case like this, 'his conduct on the witness stand, and his silence*

as to matters involved in the pending inquiry which were certainly within his knowledge, were circumstances which the jury had a right to consider in deciding upon the credit due to the witness, in connection with the other facts proved in the case, and they were therefore circumstances upon which the state's attorney had a right to comment in addressing the jury'. Brashears v. State, 58 Md. 568; McFadden v. State, 28 Tex. App. 241, 14 S. W. Rep. 128; Heldt v. State, 20 Neb. 492, 30 N. W. Rep. 626; Foote v. People, 56 N. Y. 321; State v. Tatman, 59 Iowa 472, 13 N. W. Rep. 632; Com. v. Mullen, 97 Mass. 546. The attorney's reference to the defendant's failure to contradict the witness does not warrant a reversal."

Thomas v. State, 103 Ind. 41; 2 N. E. 808.

It was held in that case, as shown by Subdivision 8 of the syllabus, that:

"A defendant who voluntarily takes the stand and broadly denies the crime, thus waives his constitutional privilege and may be cross-examined on all facts relevant and material to the issue."

Comstock v. State, 14 Neb. 205; 15 N. W. 355.

It was held in that case, as shown by Subdivision 6 of the syllabus, that:

"The fact that a prisoner does not testify on his own behalf would not operate to his disadvantage, but *if he testify and fail to controvert in any way what has been said by witnesses against him concerning a fact within his own personal knowledge, it will be taken as an admission that their testimony is true.*"

State v. Tatman, 59 Iowa 491; 13 N. W. 632.

"Upon the final trial, on the plea of not guilty, the defendant offered himself as a witness, and he was examined as to certain matters material to his defense. The district attorney, in his argument to the jury, commented upon the fact that the defendant testified to a part only of his defense, and omitted to testify upon other material facts in the case within his knowledge, and urged that such omission should be considered by the jury.

It is contended that because of this conduct of the district attorney the judgment should be reversed. Section 3636 of Miller's Code provides that defendants in criminal proceedings shall be competent witnesses in their own behalf; but if a defendant should elect not to become a witness, that fact shall not have any weight against him on the trial, and shall not be referred to by counsel for the state, and if counsel should do so, defendant shall be entitled to a new trial.

It is conceded that it was the right of the district attorney to comment on such testimony as the defendant gave; but it is urged that he had no right to comment upon the defendant's failure to testify as to matters regarding which he preferred to keep his mouth closed. *The exemption from unfavorable comment extends only to such defendants as choose not to avail themselves of the privilege of testifying in their own behalf. Here the defendant put himself upon the stand as a witness, and we can see no reason why the counsel for the state should not comment on his testimony as fully as on that of any other witness. By putting himself upon the stand, and testifying to material facts in his defense, the defendant waived the protection which the statute accords him."*

State v. Grubb (decided by the Supreme Court of Mo. in 1906), 99 S. W. 1083.

We ask especial attention to the later Missouri cases because in the briefs of both plaintiffs in error, some earlier Missouri cases, which were entirely out of line with the general trend of American authority, have been cited to sustain their contention that neither trial judge nor counsel had a right to comment on the failure of the defendants, while on the stand, to testify as to certain incriminating matters already before the jury.

In that case a defendant had taken the stand as a witness on his own behalf. Prior to that time a certain witness on behalf of the state had testified that the defendant had got from him two horses at his stable in Steelville to get to another town called Sligo. *While on the stand, defendant had failed to testify at all as to the subject of the trip.* In the course of his argument the district attorney had said:

> "Here is Herman Essman, a witness for the state. He knew Emory Grubb, and he says Emory Grubb got two horses from him at his stable in Steelville to go to Sligo. *It is a strange thing to me, gentlemen of the jury, that this Steelville trip has not been explained to you.*"

Defendant's counsel claimed that the misconduct of counsel in commenting on the silence of defendant as to the trip constituted reversible error.

> "The testimony had shown that these two defendants appeared at the house of Mr. Par-

rott about sundown on the evening of the 6th of June, 1904, riding two horses, answering the description of Essman's horses, and driving cattle with the brands and marks of the cattle that were stolen from the Sligo pasture, and of the same colors and all dehorned, and it had been shown by Essman that the defendants in June had got two horses answering to the description of those ridden by the defendants that day, and to be used for three days, and were not returned until the morning of the third day. *To say that counsel for the state, with all these incriminating facts tending to show the theft of the cattle and the possession of them at sundown on the evening of the 6th of June by the defendants, should not be allowed to argue that these facts called for an explanation by the defendants of the time when they hired the horses from Essman, and the place to which they went, would be announcing the rule that counsel for the state are no longer permitted to make a logical argument and discuss incriminating facts to a jury,* because of section 2638, Rev. St. 1899 (Ann. St. 1906, p. 1569), which provides: 'If the accused shall not avail himself or herself of his or her right to testify * * * it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by attorney in the case, nor be considered by the court or jury before whom the trial takes place.' *That section, in our opinion, was never intended to prohibit, nor did it have the effect of prohibiting, a court having criminal jurisdiction from instructing a jury as to the presumption arising from the recent possession of stolen property, nor to deprive counsel for the state of arguing the effect of the failure by defendants charged with larceny to explain the possession of stolen property recently after it had been stolen.* In our opinion, if Mr. Cope

made the statement attributed to him, he did not violate the prohibition of the statute, but was *entirely within the scope of a legitimate discussion of the evidence in the case.*"

This recent Missouri case does not, in terms, repudiate or reverse the earlier Missouri decisions which we have said are counter to the general trend of American authority.

In view of the persistency with which the several cases decided by the Supreme Court of Missouri have been urged upon the attention of this court by plaintiff in error in the present case, and by Caminetti in his brief, we ask attention to some very recent adjudications made by the Supreme Court of Missouri. As before indicated by us, the Missouri decisions relied on by adverse counsel were out of line with the general trend of American authority on the subject. Since the government's brief in the Caminetti case was set up by the printer, two Missouri cases have come to our attention which were not cited in that brief. They are the cases of

State v. Raftery, 158 S. W. 585-8 (decided by the Supreme Court of Missouri June 28, 1913);

and

State v. Larkin, 157 S. W. 600-4 (decided by the Supreme Court of Missouri in May, 1913).

In the Raftery case the court said:

"This court has recently held in State v. Larkin that *counsel for the state has the right*

to comment on the failure of the defendant, while on the stand, to deny incriminating statements attributed to him by other witnesses. It is a wholesome rule, and we abide by it."

In the Larkin case the court said:

"Defendants strenuously urge that the court erred in permitting the prosecuting attorney to comment upon the failure of defendant Roy Larkin who took the stand as a witness in his own behalf, *to deny certain statements which the prosecuting attorney averred had been made by him to Mrs. Harris.* * * * (p. 605.) *We have carefully examined the statutes and holdings upon this question of more than thirty states, and we find that it has been held universally that, if the defendant is not sworn as a witness in his own behalf, any comment by the prosecuting attorney on his failure so to testify constitutes reversible error, in the absence of a peremptory and proper rebuke by the trial court. But, on the other hand,* except in our own state and in California, where the question has been sometimes doubted, *the right of the prosecuting attorney to comment upon the failure of the defendant, when he takes the stand as a witness in his own behalf, to deny or explain incriminating facts and statements, has been uniformly held allowable."*

The Missouri Supreme Court, in its opinion, calls attention to the following list of cases which, on examination, will be found to sustain the doctrine so clearly set forth in the opinion:

Solander v. State, 2 Colo. 56;

State v. Tatman, 59 Iowa 471; 13 N. W. 632;

Stover v. People, 56 N. Y. 315;

Heldt v. State, 20 Neb. 500; 30 N. W. 626; 57 Am. Rep. 835;
Comstock v. State, 14 Neb. 205; 15 N. W. 355;
State v. Staley, 14 Minn. 118 (Gil. 75);
Cotton v. State, 87 Ala. 103; 6 So. 372;
Clarke v. State, 87 Ala. 71; 6 So. 368;
Lee v. State, 56 Ark. 4; 19 S. W. 16;
McCoy v. State, 46 Ark. 141;
Brashears v. State, 58 Md. 567;
McFadden v. State, 28 Tex. App. 241; 14 S. W. 128;
Lienburger v. State (Tex. Cr. App.) 21 S. W. 603;
Parker v. State, 62 N. J. Law 801; 45 Atl. 1092;
State v. Harrington, 12 Nev. 125;
State v. Ulsemer, 24 Wash. 659; 64 Pac. 800;
Hanoff v. State, 37 Ohio St. 178; 41 Am. Rep. 496;
State v. Ober, 52 N. H. 459; 13 Am. Rep. 88;
State v. Glave, 51 Kan. 330; 33 Pac. 8;
Toops v. State, 92 Ind. 13;
Commonwealth v. McConnell, 162 Mass. 499; 39 N. E. 107.

The court, in its opinion, further discusses the subject in the following language:

> "The rule that no reference shall be made to the neglect, failure, or even refusal of a defendant to avail himself of his right to testify shall not be commented on in the event he does not become a witness in his own behalf is therefore, we find, universal; but, on the contrary,

the rule that if he does go upon the witness stand he then stands in the precise attitude of any other witness is, except in this state, and, as stated, in California, where the rule is subject to some doubt, also universal. Mr. Wharton in his learned and able work on Criminal Evidence lays down in the tenth edition thereof the rule that *such comment is allowable;* to this statement of the text he cites no exceptions, and correctly quotes the Missouri courts as entertaining like views. Wharton, Crim. Ev. (10th ed.) sec. 435a. * * * For many years, and in practically every jurisdiction in the American Union, it has been vehemently urged in perhaps more than a hundred cases that the right of the state to cross-examine a defendant who at his own request, and not otherwise, takes the stand as a witness in his own behalf, is *limited by the constitutional inhibition, against self-incrimination.* But, without citing cases, it may be said that *this question is now well settled against the contention urged. The contention that, absent a statute such as we have, cross-examination is limited by the constitutional rule against self-incrimination, has been exploded utterly on the ground that there is sufficient protection against self-incrimination when it is provided that a defendant may or may not testify for himself, according as he may desire.* * * *

(606) Nothing is clearer, when we consider the history of this legislation, when we consider that at common law the defendant could not testify in his own behalf, and that the two sections of our statute were intended to modify the common law, and when we consider the rule that *this modification of the common law ought to go no further in its construction than its terms expressly provided, than that there is no legal or statutory prohibition against comment by the prosecuting attorney in any case, if in fact the accused does avail himself of his right to testify.*

In logic and reason it is no argument against this view that the state by an express statutory provision is precluded from cross-examination of the defendant upon any matter other than that about which he shall himself testify in his examination in chief. * * * *Other states*, as we have seen, without having in their statutes the provision that a defendant testifying for himself 'may be contradicted and impeached as any other witness in the case', *have, yet with practical unanimity, held that, if a defendant avails himself of his right to testify, he then stands as any other witness, and his silence in explaining and his failure to deny or contradict incriminating facts, statements, or circumstances may be fully commented on by the prosecuting attorney.* It is our duty to construe our own statutes as we find them in the light of their language, intent, and logic. *There is no valid reason for the construction which has long been put by this court upon this provision of our statute. It is in absolute conflict with the rule announced by the text-writers and diametrically in conflict with the holdings of at least forty-six states in this Union on this identical question.* In Iowa, as has been noted, there is a statute making the prosecuting attorney guilty of a misdemeanor if he refers to the failure of the defendant to take the stand and testify in his own behalf, but if the defendant does take the stand, and does make himself a witness for himself, the right of comment upon the defendant's failure to deny, or contradict incriminating facts, statements or circumstances is left absolutely open to the state. State v. Tatman, supra. Time and again, ever since the rule announced in State v. Graves, supra, which is now criticised, was first enunciated, this question has been up for ruling. *It needlessly, and in the writer's view erroneously, reverses more cases than any other single point which we are*

called on to review. * * * For years subsequent to the rendition of the opinion in State v. Graves, supra, where the contrary doctrine to the one discussed here was first enunciated in this court, the cognate rule above referred to of *presumption arising as a matter of law from the failure of the defendant to deny incriminating facts or circumstances was fully recognized.* * * * (Citing cases.) * * * It is difficult to see why, if such a presumption is as a matter of law entertained against a defendant when he takes the stand as a witness in his own behalf, such presumption might not be commented on by the prosecuting attorney in a case where the defendant likewise becomes a witness in his own behalf. We concede that, if there were any restrictions whatever placed upon the defendant as to the nature or extent of his testimony when he has elected to become a witness for himself, then there would be some reason in the rule. But there is no such restriction upon him. *His right to explain, deny and contradict is as unlimited as the rules of evidence, and as broad as the issues pertinent to the matter under inquiry.* In order to reach this conclusion, we must perforce read into section 5243 words that have not been placed in that section by the Legislature. We must make the first clause of that section read: 'And if the accused shall not avail himself of his * * * right to testify, *on any question, point, fact or circumstance, then*' etc. When we consider that the statute in question changes the common law, *it is difficult to see our warrant for reading into this section words that the Legislature has not in express language placed therein. We conclude that the case of State v. Graves,* 95 Mo. 513, 8 S. W. 739, *which enunciated the rule that no comment shall be made by the prosecuting attorney or other counsel for the state on the failure of the defendant to testify about or to*

deny or contradict any statement, fact or circumstance in the case, as well as other cases in this state which announce the same rule, following the case of State v. Graves, ought to be overruled and no longer followed in this behalf."

At page 46 of their brief, counsel for plaintiff in error cite and quote from the case of *Williams v. United States,* 168 U. S.....; 42 L. Ed. 509. Counsel claims the case is directly in point. An examination of the very language quoted by counsel, in our judgment, will show directly the reverse of the position taken by them. The case is not in point.

At page 47 they quote the following portion of the charge of the trial judge in the Williams case: "If in this case the defendant could have produced *testimony explaining his several deposits in the San Francisco Savings Union and the Hibernia Bank during the months of September, October, November and December, 1895, and has failed to produce such testimony, then you are at liberty to infer that any explanation in his power to make, would have been, if made, adverse and prejudicial to the defense."*

We ask the court, in connection with this language, to look on the same page of the brief (47) at the language of the justice of the Supreme Court in passing on the correctness of the charge:

> "The accused was entitled to stand on the presumption of his innocence and it cannot be said from anything in the present record that he was *under any obligation arising from*

> *the rules of evidence to explain that which did not appear to have any necessary or natural connection with the offense imputed to him. In our judgment, the court, under the circumstances, disclosed error in not excluding the affidavit and bank books as evidence, as well as what defendant said to the jury on that subject."*

That case certainly is very far from serving as any proper basis for the contention here made by counsel for plaintiff in error. The evidence as to which the trial judge directed the jury was *evidence which should not have been in the record,* and had no bearing on the question of his guilt or innocence. Naturally enough the trial judge had no right to instruct the jury that the defendant was under any obligation *to explain matters which had no proper or possible connection with the question of his guilt or innocence.*

Another decision from the Supreme Court of the United States, referred to in connection with this subject is *Davis v. United States,* 160 U. S. 469. Counsel cite and quote from this case at pages 60-1. In our judgment the matter there suggested is not pertinent to the question here under investigation. The matter there considered was the question whether a defendant relying on insanity as a defense, should establish such defense by a preponderance of the evidence. The Supreme Court very properly, and in line with the general trend of decisions on the subject, held that the general doctrine on the subject of reasonable doubt as

to the guilt of the defendant must govern the final determination of that question by the jury, and that if on the entire testimony covering the question of insanity, as well as other questions, the jury entertained a reasonable doubt as to defendant's guilt, the accused was entitled to the benefit of such doubt.

IV.

The Trial Court Committed no Error in Refusing to Give the Instructions Requested by Defendant to the Effect that Lola Norris and Marsha Warrington Were Accomplices and that Their Testimony Should be Received with Caution and Weighed and Scrutinized with Great Care by the Jury.

At pages 67-95 counsel for plaintiff in error argue that the court erred in refusing instructions on the subject of Lola Norris and Marsha Warrington being accomplices and on the manner in which their testimony should be received by the jury and weighed in arriving at their verdict. This same subject matter is discussed in Subdivision IV of Caminetti's opening brief at pages 147 to 169.

The same matter is treated by us in the government's brief filed in the Caminetti case in Subdivision V, at pages 90-112. We respectfully request this court to refer to the argument there made by us. The facts and the law involved in the Caminetti case are substantially identical with those involved in the case at bar.

The proposed instructions requested by Diggs, as those offered by Caminetti, were inapplicable to any issue in the cause.

Unless the proposed instructions were responsive to some phase of the controversy being tried by the court, the trial judge was justified in refusing to give any of them to the jury. At page 91 in our former brief we cite cases sustaining this proposition.

If the record in the present case is destitute of any evidence upon which the jury under appropriate instructions would be justified in reaching the conclusion that either Lola Norris or Marsha Warrington was an accomplice, the action of the lower court in refusing to give to the jury the requested instructions was not only eminently proper but the only course which it had the legal right to pursue.

The position of the government upon this question is that under no aspect of the case can it be successfully contended that under the evidence or the law, either Lola Norris or Marsha Warrington was or could be held to be an accomplice of Maury I. Diggs.

In the statement of the facts in the present case we have shown by the testimony of Diggs himself that for two weeks before the departure for Reno, he had been arguing with Marsha Warrington to induce her to leave Sacramento and go with him (Rec. 321). While in hiding in the Columbia Hotel

in Sacramento Diggs says that the two girls were invited to the Columbia Hotel to meet himself and Caminetti (Rec. 335). In speaking of the subject of their conversation he said: "It was in regard to our conditions."

At page 233 *Marsha Warrington shows how Diggs told her all the things that would happen to her if she did not go with him.* The same witness further shows at pages 233-4 how protracted argument was had at the Peerless restaurant on Saturday, March 8th, before the girls could be *coerced into a reluctant consent to accompany Diggs and Caminetti on the trip.*

The next afternoon when told by the girls that they had reconsidered the matter and withdrawn their consent, *Diggs forced the two girls again to consent,* after suggestions and arguments that *the wives of Diggs and Caminetti would bring actions resulting in the imprisonment of the girls and that warrants were to issue next day for their arrest* (Rec. 232). We have shown how the false suggestion was made about *impending scandalous publications in the Sacramento Bee,* and how it was said that *complaint had already been lodged with officials of the Juvenile Court to secure the arrest of the two girls.* Under conditions of this character was the final consent secured from Marsha Warrington and Lola Norris to accompany Diggs and Caminetti on their Reno trip. *Marsha Warrington was then in the highly nervous condition resulting from her pregnancy by Diggs.* As she said, at page 253 of

the record: *"I went willingly after I was scared into it."*

Lola Norris at pages 265-269 shows how she likewise was subjected to cajolery, coercion, misrepresentation and intimidation and how, under those circumstances, she gave a consent which was several times recalled before actually entering upon the journey. Neither in fact nor in law were the girls accomplices in the violation of the White Slave Traffic Act by either Diggs or Caminetti.

In this connection see

People v. Stratton, 141 Cal. 604-6,

cited by us at pages 94-5 of our brief in the Caminetti case;

People v. Miller, 66 Cal. 468,

cited by us at page 96 of our former brief.

Greenwood v. State, (Okl.) 105 Pac. 371-3,

cited by us at page 96 of our former brief.

We ask attention here to the argument and authorities shown at pages 97-101 of our former brief, wherein we show that these girls were not accomplices for the reason that as the victims, willing or otherwise, of their transportation in interstate commerce, they could not nor could either of them, have been indicted, tried or punished under the provisions of the White Slave Traffic Act.

Even if they were accomplices, no error is shown in the refusal of instructions. Here, as in the Caminetti case, the jury acquitted on the counts of the indictment declaring on the persuasion, inducement

and enticement. The first two counts of the six in the indictment refer to the transportation of the two girls in interstate commerce. The third and fourth counts refer to the procurement of the tickets for the trip. The only counts of the indictment as to which any possible claim of accomplice could apply, were the fifth and sixth counts relating to the unlawful persuading, inducing or enticing. Since that feature of the case has been eliminated by the verdict, no prejudicial error is shown in the refusal of instruction, even if the girls, under any possible aspect of the testimony, could be regarded as accomplices. Furthermore, even if they were accomplices, failure to give cautionary instructions constituted no error. In this connection see the authorities cited in our brief in the Caminetti case at pages 107-110.

In addition to the cases there cited we ask attention to

People v. Solander, 2 Colo. 48-49.

The court there said:

> "I have found no case in which the verdict being correct on the mere omission of the court to charge the jury as to the weight to be given to the testimony of an accomplice, has been held to be error for which a new trial could be granted. But if such is the rule where there is no testimony to corroborate the accomplice, and the text of Mr. Greenleaf certainly supports that view I think that it cannot be extended to a case in which the accomplice is supported by other testimony.

Of course, the California rule followed in the case of *People v. Coffey,* based on the statute forbidding conviction on the uncorroborated testimony of an accomplice, cited by both plaintiffs in error, has no application to the trial of an indictment in the federal court. The girls here were abundantly corroborated by many other witnesses in the case.

V.

The Only Issue Involved in the Indictment Against Diggs Certainly Did Not Escape the Attention of the Trial Judge.

At page 96 of their brief, counsel for Diggs in the third subdivision of their argument, use this heading:

> "The only issue involved in the indictment escaped the attention of the trial court. This issue was also the only issue in evidence. The whole charge of the trial court to the jury was, for this reason misleading and erroneous and the jury was blinded as to the real issue. By reason of this, therefore, defendant failed to receive a fair and impartial trial."

A discussion of this amazing proposition is carried on from pages 96 to 113. The argument presented in these pages in Subdivision III by counsel for plaintiff in error is identical in language with that shown in Subdivision XIV of Caminetti's brief, at pages 298 to 314. The argument in the Diggs brief is a perfect duplication of that in the Caminetti brief as to language and citation of au-

thorities, the only change being in the substitution of the names of the parties and the pages of the record involved in the rulings. The initial language of the argument in each brief is:

> "The whole charge to the jury is pregnant with the above misconception indulged in by the trial court.
>
> The court labored under the impression that the defendant was charged with the interstate transportation of the woman for the purpose of 'debauchery'. The prosecution also misconceived the nature of the issue."

The trial judge in the present case, as in the Caminetti case directly called the attention of the jurors to the language of the indictment and to the language of the statute under which the indictment had been found. We feel that the argument thus identically urged in both briefs may be met by us without duplication of our work and that of this court. In our judgment the position of counsel in this regard has been adequately met in Subdivision XV of our brief in the Caminetti case at pages 204 to 212.

The charge of Judge Van Fleet referring to the several counts of the indictment is shown at pages 371-377. In that portion of the charge, Judge Van Fleet defines the several terms "concubine", "mistress", "debauchery", and their relation to the immoral purposes or practices denounced by the statute.

At pages 207-209 we showed by definitions from standard lexicographers that the terms, as defined

by Judge Van Fleet, were correctly defined by him.

At page 209 of our brief we quoted the language of Mr. Justice Harlan, shown in the case of *United States v. Bitty,* 208 U. S. 393-403; 52 Law Ed. 547.

We ask attention to a portion of the quotation from that opinion shown at pages 209-210 of our brief:

> "We must hold that Congress intended by the words *'for any other immoral purpose' to include the case of any one who imported into the United States an alien woman that she might live with him as his concubine.* The statute in question, it must be remembered, was intended to keep out of this country immigrants whose permanent residence here would not be desirable, or for the common good, and *we cannot suppose either that Congress intended to exempt from the operation of the statute, the importation of an alien woman brought here that she might live in a state of concubinage with the man importing her, or that it did not regard such an importation as being for an immoral purpose.*"

At page 210 of our brief in the Caminetti case we asked attention to the following language used by District Judge Foster of the Eastern District of Louisiana, in the case of *United States v. Flasboller,* 205 Fed. 1007:

> "The indictment sets out that the woman was persuaded to go from one state to another *for the purpose of engaging in illicit intercourse, cohabitation and concubinage with accused. Certainly illicit cohabitation and concubinage are immoral acts analogous with prostitution, and*

> *come well within the letter of the statute. * * * In my opinion the case is on all fours with that of the United States v. Bitty,* 208 U. S. 293, *and interpretation of the statute must be controlled by that decision."*

The position of counsel in regard to this question in the present case, in our judgment, is fully met by the argument advanced by us in our former brief.

In this case, as in that, suggestion is made that the author of the White Slave Traffic Act had, in a report submitted to Congress, suggested that the case of *Bitty v. United States* had no bearing on the question here before the court.

This suggestion of counsel may be well met by the language of Mr. Justice Harlan in the Bitty case itself.

> *"The intention of the Legislature is to be collected from the words they employ. * * * The case must be a strong one indeed which would justify a court in departing from the plain meaning of words,* especially in a penal act in search of *an intention which the words themselves did not suggest."* (See the opinion of Justice Harlan set out in our Caminetti brief at pages 61 and 66.)

A further answer is furnished in the language of Circuit Judge Baker, speaking for the U. S. Circuit Court of Appeals for the 7th Circuit, during the January session of 1914, in the case of the notorious Jack Johnson. The case is reported as *John Arthur Johnson v. United States of America.* The opinion in this case is set out in our Caminetti brief

at pages 66 et seq. At page 69 of our brief appears this language quoted from that opinion:

> "Against upholding the conviction on the sexual intercourse counts defendant's first insistence is that *the intention of Congress was otherwise.* By noting current history we may be aware that the act, when applied to merely unlawful sexual intercourse, has been used as an instrument for blackmail or other oppressions; but *that has nothing to do with a judicial ascertainment of the meaning and constitutionality of the act when it was adopted. Reference is made to public debates as indicative of the author's intent. But the writer of a bill may explain his purpose to fellow members and they may vote for it solely because in their judgment it has a wider or narrower scope than he states.* This is one of the considerations that ages ago led to the *universal canon of interpretation, that in the absence of ambiguity apparent upon the face of a document extraneous references are not permissible and the meaning is to be gathered exclusively from the text with the words taken in their ordinary and usual meanings.*"

For the purpose of sustaining their view as to the proper construction of the act counsel for plaintiff in error in this case, as in the Caminetti case, rely on certain language found at pages 6 and 7 of Report No. 47 on White Slave Traffic, filed December 21, 1909, at the second session of the 61st Congress. The language is as follows:

> "Section 3 of the Act of February 20, 1907 (Immigration Act) has received the consideration of the Supreme Court in two cases.
>
> In the first case, that of the United States v. John Bitty (208 U. S. 393) the Supreme Court

held that a foreign woman being brought to the United States as the personal private mistress of a man living here, was being imported *'for other immoral purposes'*, and that thereafter the importer was subject to the penalty of the statute and the woman to deportation.

This decision is not pertinent to the phase of the subject under discussion and is mentioned only in passing."

What was the particular *phase* of the subject covered by the act which was *then under discussion.* Some enlightenment on this subject may be had from Part 2 of Report No. 47, being the report of the minority of the committee opposing the enactment of the proposed law. The report of that minority of the committee is signed by W. C. Adamson, William Richardson and C. L. Bartlett, and styled "Views of the Minority".

At page 3 of the minority report we find the following:

"Our chief objection to the bill is that under the exclusive authority that the Congress has under the Commerce Clause of the Constitution to regulate, direct and control commerce among the states and foreign nations, that incidentally or otherwise, *Congress cannot, in the exercise of police power, punish citizens of the state for violating a federal statute made under the pretense of regulating commerce and suppressing evils, which in the strictest and most literal sense, along with the health, peace and order, is an affair that belongs to the states and the federal government never has and never can, under our existing federal system, lawfully claim or exercise such power, except in the District of Columbia and the territories."*

The objection urged in this language was the peculiar phase of the subject under discussion with reference to which the majority report in referring to the case of *United States v. Bitty,* said:

> "This decision is not pertinent to the phase of the subject under discussion and is mentioned only in passing."

The majority of the committee entertained the view that the Bitty case determined nothing in this controversy. We respectfully submit that that judgment must give way and fall before the authoritative declarations made on the subject by the judicial branch of the government. It is hardly proper that on such fractional legislative authority we should be expected to overrule the decisions of the various federal courts that have passed upon this question.

VI.

There Is No Merit in the Claim of Undue Probative Importance Alleged by the Counsel for Plaintiff in Error to Have Been Attached by the Trial Court and Counsel for the Government in the Matter of the Blood-Stained Sheet.

At pages 114 to 137 of their argument they argue the proposition thus stated in Section 4 of their brief in this language:

> "The undue probative importance placed by the prosecution and the trial judge upon the blood-stained sheet taken from the Reno cot-

> tage distorted and influenced the minds of the jury to such an extent as to deprive defendant of a fair and impartial trial and also constituted *gross misconduct on the part of the prosecuting attorneys and the trial judge.*"

This matter, discussed with seeming seriousness, has taken unto itself an argumentative value or volume of twenty-four pages of print. We fear that we might deserve, if not invite, a real rebuke for real misconduct if we should pursue counsel for plaintiff in error through the twenty-four pages of print devoted to this subject. Life is too short,—the labor of the judges of this court too arduous for us thus to offend.

At page 134 counsel say:

> "Although the record is silent, nevertheless to be charitable to the presecuting attorneys" (small favors thankfully received) "it undoubtedly was the intention of the prosecution to *prove a seduced virgin.* But when the victim testified to the facts, the result was disastrous. The damage, however, was done, and the prosecution could not then undo the gross error."

Poor little Lola Norris, according to her uncontradicted story, became a *"seduced virgin"* only when Diggs had finally and firmly placed her in the embrace of the persistent Caminetti after months of endeavor and pursuit.

The charges of misconduct of counsel and court in the attachment by them of undue probative importance to the bloody sheet must fall for lack of any real worth.

VII.

The Charge of Misconduct of Counsel During Opening and Closing Arguments is Warranted Neither in Fact Nor in Law.

At pages 138 to 181 of Subdivision V of their argument, counsel for plaintiff in error urge that the counsel for the government were guilty of misconduct in making their opening and closing arguments. The government counsel afforded no just ground for this claim of misconduct so vehemently urged during the trial and here advanced with such volume of words.

A similar argument was advanced in Subdivision VI of the Caminetti brief, covering pages 207 to 248. The argument here is not absolutely identical in language. The argument here covers forty-four pages, while the other covers only forty-two. The authorities cited and relied on in both cases are largely the same.

At pages 142-3 of the Diggs brief counsel cite twenty cases of identical title in identical order as the same twenty are shown at page 213 of the Caminetti brief. The symmetry of presentation is so excellently executed that two incorrect citations of the Caminetti brief are duplicated in the Diggs case, the cases being *Collins v. State,* cited as being in 145 S. W. 1065, whereas no case of that title is reported in 145 S. W. The case referred to is in 148 S. W. 1065. The other of the two cases being *People v. Burke,* 145 Pac. 1065, a volume not yet published, the current volume number being 143.

The general subject of misconduct of counsel was discussed by us in the Caminetti case at pages 149-195. Much of the argument of counsel for defendants is directed not only at the openly claimed and much reiterated charge of misconduct of counsel, but also at the insinuated unfairness, impartiality, bias and prejudice of the trial judge. The claim is not warranted,—either in the case of the court or of counsel.

In our Caminetti brief we have cited many cases showing the absolute unworth of the pretense here made that defendants in these cases were victims of prejudicial error at the hands of government counsel or of the court. Whatever was referred to by counsel in the arguments, opening and closing, as facts or logical inferences from the testimony, had absolute foundation in the record. Whatever was urged upon the jury to influence their action or secure a verdict was within the legitimate range of argument or suggestion. In this connection see cases cited by us at pages 176-185 of our Caminetti brief and also the argument and authority submitted by us at pages 188-195 of that same brief.

IF THERE WERE ANY MISCONDUCT OR REFERENCE TO EXTRANEOUS MATTER IN THE STATEMENT OF COUNSEL, THE MATTER IS NOT IN SUCH SHAPE AS TO BE OPEN TO REVIEW HERE.

As to the facts warranting the verdicts against these two co-conspirators in the degradation and ruin of these two girls who stood at the threshold

of womanhood, no scintilla of doubt could abide in the mind of any sane juror of average intelligence, after hearing the testimony of the two girls and the many other witnesses who corroborated their testimony.

In this connection we again ask attention to the language of Judge Van Fleet in his charge shown at pages 382-3 of the record:

> "While, as I have stated, it is the duty of the Court to declare the law, and that of the jury to be governed by it in their consideration of the evidence, it is, on the other hand, the province and right of the jury to pass upon the facts in the case and the credibility of the witnesses. With those functions the Court has nothing to do, other than to endeavor to see that only proper evidence is permitted to go before the jury for their consideration; and it is neither the province nor the disposition of the Court to intentionally interfere with that duty of the jury. *If, therefore, during the progress of this trial you have gathered any impression from anything which the Court may have uttered in your presence, as to the views or judgment of the Court on the question of the defendant's guilt or innocence, or as to the weight of any evidence or the credibility of any witness, you will disregard such impression, should it not accord with your own views, and base your finding upon your own independent judgment as to what the sum of the evidence discloses;* and when I refer to the evidence I refer solely to such evidence as has been finally permitted to go in and remain before you for your consideration. Any evidence that during the course of the trial has been primarily admitted in evidence and thereafter withdrawn is out of the case for any purpose for your consideration. And in this connection, *as re-*

quested by counsel for the defendant today during an incidental argument, I should suggest to you, gentlemen, that the statements or declarations of counsel made at the bar are in no sense evidence for your consideration. You are to confine your consideration alone to the evidence that has been admitted before you from the witness stand or in the way of exhibits or other physical evidence which may have gone in before you."

In the same spirit of confining the jurors to matters properly in evidence before them, the court said at page 392:

> "Perhaps I should again admonish you that to no extent must you permit yourselves to be influenced in your verdict by the fact that this case has attracted so much attention and given rise to so much controversy in the public press, the halls of Congress, and among the people, prior to this trial, by reason of certain incidents arising in its earlier history. Those facts are wholly extraneous to your inquiry or to mine, and we have nothing whatsoever to do with them. They in no way affect the merits of the case, and you should be careful to avoid permitting any feeling of bias or prejudice flowing therefrom to find reflection in your verdict."

Furthermore, if there were misconduct,—if there were prejudice,—if there were action by the court or counsel which, if properly presented to an appellate tribunal, might in any possible aspect afford a ground for reversal, plaintiff in error did not lay a proper foundation for presenting such question here for review by this appellate tribunal.

Judge Van Fleet, as we have seen at page 383, did, as requested by counsel, charge the jury as follows:

> "And in this connection, as requested by counsel for the defendant today during an incidental argument, I should suggest to you, gentlemen, that the *statements or declarations of counsel made at the bar are in no sense evidence for your consideration. You are to confine your consideration alone to the evidence that has been admitted before you from the witnesses stand, or in the way of exhibits or other physical evidence which may have gone in before you.*"

If, as to any of the matters relied on by plaintiff in error as constituting misconduct of counsel any other or further instruction or warning as to any such matter here urged as misconduct were desired, the time to secure the same was when, at the close of the long trial, Judge Van Fleet was giving the jury his final instructions to govern their deliberations. No such request was preferred. The record shows no warning suggested in the guise of a requested instruction proposed by counsel. In the absence of such request and an exception based on the refusal of such request, any possible claim of prejudicial misconduct is without legal foundation. The rule on this subject was quoted by us from *12 Cyc.,* 585, at page 161 of our former brief, as follows:

> "Improper remarks in argument by the prosecuting attorney, although prejudicial, do not justify a reversal *unless the court has been requested to instruct the jury to disregard them and has refused to do so.*"

Cases sustaining the rule thus stated in *Cyc.* are shown at pages 161 to 169 of our brief in the Caminetti case. We respectfully refer the court to that brief for a fair presentation of our views. In our judgment the argument there made adequately meets the contention of counsel for plaintiff in error in this case.

VIII.

Further Charges of Misconduct of Counsel Unwarranted.

At pages 182-195, in Subdivision VI of their brief, counsel argue the question thus stated on page 182:

> "Misconduct of counsel for the prosecution during the trial, *permitted and condoned by the trial judge,* prejudiced defendant and his case to such an etxent with the jury as to deprive him of a fair and impartial trial."

The first matter of serious misconduct charged to counsel for the government and said to have been condoned by the trial judge, is the bloody sheet. It must be that its alliterative association with the bloody shirt of the days following our Civil War has suggested this subject as a means of stirring up what is here an unnecessary controversy.

The bloody sheet seems to counsel much more potent in argument than in probative value. It has received all the treatment at our hands that it deserves. It may well be burned, buried or otherwise

eliminated from any possible opportunity for future use.

Another alleged aggravated offense against forensic discretion and propriety, is aimed at Mr. Matt I. Sullivan, senior counsel for the government, at page 189. The gentlemen representing Mr. Diggs say:

> "Still another *pure specimen of sharp practice* indulged in by both attorneys representing the United States, and which was *aggravated by the indulgence of the trial judge,* will be found at pages 355 to 357 of the record. The record there shows the following proceedings took place:
>
> Mr. Sullivan. Q. Mr. Diggs, during the course of this trial and in the presence of the jury here, during the cross-examination of Miss Warrington, did you not repeatedly suggest to your counsel questions to be propounded to Miss Warrington, asking her if she did not at divers times have intercourse with you?"

This question, in our judgment, was one which legitimately might occur to any counsel conducting a cross-examination under the circumstances shown by the record. Certainly a defendant, under cases above called to the attention of the court, may be treated while on the stand in the same way as any other witness whose conduct or motives may be inquired into for the purpose of determining his credibility or the probative value of his testimony.

As a matter of fact, Diggs had prompted the question referred to by counsel in the question that he asked of Diggs while on the stand. The *seeming reluctance* of Diggs to make any statement while

on the stand as to *his intimate relations with Marsha Warrington* is shown at page 354 of the record.

He was asked:

> "Q. And did you and Miss Warrington there have sexual intercourse?
> A. I would rather not speak of the relation * * * I would rather not speak of my relation with Miss Warrington."

It was following this exhibition of simulated reluctance on the part of Diggs that counsel asked the question, the mere asking of which is claimed to constitute misconduct on the part of government counsel.

When testifying to the actual fact whether or not he had prompted his counsel to ask questions of Marsha Warrington on cross-examination, he testified as follows:

> "Q. *Didn't you suggest that question to your counsel?*
> A. Well, I suggested that to my counsel a long time before I came into the court room * * * *that suggestion may have been made by me during the cross-examination of Miss Warrington.* I don't remember. *I won't say that I did not make the suggestion.*"

If it be the fact, as admitted by Diggs, that he did prompt the question,—if it be the fact, as it undoubtedly is, that the prompting of the question was manifest to the eye and ear of those who were in the court room, it is perfectly natural that counsel should assume in testing the conduct of the defendant as a witness on the stand that he had a

right to show that his seeming reluctance to answer questions when on cross-examination as to his relationship with Marsha Warrington was only affected, when as a matter of fact he had tried by his own suggestion to get Marsha Warrington, his victim, while under cross-examination, at his instance, to testify to the identical subject matter involved in the question which he showed a reluctance to answer.

The whole case showed that anything like a sense of delicacy was absolutely foreign to the nature of Maury I. Diggs. When he affected a reluctant hesitancy to disclosing by his own answer the actual relationship between him and this young woman, he belied his whole conduct during the trial and his whole history, as testified to, during the several months preceding the Reno trip. His very illicit relationship with the girl was the argument advanced by him to induce her to make the trip with himself and Caminetti.

The question asked by counsel cannot, by any possibility of argument, be distorted into misconduct of counsel which could afford a ground for reversal of the judgment here under attack.

In disposing of the matter at the time the trial judge made this remark as shown at page 356:

> "The jury will understand that the argument of counsel, arising on an objection, is not evidence in the case and is not to be considered by the jury in determining the issues to be submitted to them."

As we have shown, the court during his charge, fully covered this and any other matters which might have been excepted to as constituting misconduct of counsel. This subject has been sufficiently discussed, in our judgment, in the preceding pages and in our brief in the Caminetti case.

IX.

The Trial Court Committed no Error in Overruling the Objection to the Question Asked of the Witness Diggs as to What Was Meant by the Reno Trip.

At pages 196 to 200 in Subdivision VII of their argument, counsel for plaintiff in error argue the proposition thus stated:

> "The trial court erred in compelling the defendant to testify to certain matters which are not the proper subject of cross-examination."

Counsel apparently misconceive both the record and the law with reference to this matter. The matter here involved is not that of compelling a defendant standing on his privilege and refusing to incriminate himself to give an answer if silent on cross-examination. There was neither assertion of his privilege—if, under the law, he had any such privilege after waiving it by his voluntarily taking the stand—nor compulsory action by the trial judge. The record as quoted by counsel at pages 196-7 shows merely an objection that the challenged question was not cross-examination. In any event, in

no aspect of the case could the action of the court be prejudicial error. Apparently counsel make their bold assertion without due regard to the matters shown by the record. Both during the direct examination and the cross-examination, without objection, did Diggs speak of the Reno trip.

Diggs had met the girls and had a long conference in the afternoon, and by an appointment, a meeting was arranged for eight o'clock that evening at the Saddle Rock restaurant. At page 342 Diggs testified:

> "In a few minutes, a little after eight o'clock, I believe, the girls showed up. * * * While we were in there Miss Warrington came. She did not have her grip. * * * I called a messenger up and sent him for the grip. * * * In the meantime Mr. Caminetti showed up on the scene. He was pretty much under the influence of liquor. He says, 'Well, what's doing?' *I said, 'Well, I am going and the girls say they are going, too.'* He says, 'Where are you going?' I said, 'I don't know. *Anything to get out of town for a while.*' He said, 'Well, I haven't got any money. I will go down town and get some.' Which he did. He went away and went down town and got some.
>
> (343) *I got the full information of all the trains and also the cost of transportation between different places from Sacramento to various positions.*
>
> (344) *The next train leaving town was 10:45, the eastbound train, and we all agreed to catch that train.* I called Mr. Caminetti up on the telephone again—in the meantime he was down to O'Brien's saloon. He had left in the meantime and gone down town to get some money. He said he was going down to Joe

O'Brien's to cash a check. I telephoned to him down there and I got hold of him or left word for him. * * * *I told him, I left word we were going to catch the 10:45 train.* He didn't show up for that train. Miss Warrington and I went over to the depot. When the train got ready to go I thoroughly made up my mind * * * that I didn't care who went or who was ready to go or anything else. If the crowd wasn't ready to go I was going along. I was going to get out of town. Mr. Caminetti did not appear. * * * Miss Warrington walked over to the Southern Pacific station with me and the train stopped. We were contemplating about taking it. * * * I was contemplating in my own mind whether to take the train or not. * * * Then we went back to the restaurant.

(345) Before we went to the restaurant we sat in a little carhouse and waited a few minutes and thought that Mr. Caminetti might come along."

The 10:45 train was an eastbound train which passed Reno.

All the testimony above elicited from Diggs in connection with taking the eastbound train was on direct examination. On cross-examination, without objection, he testified as follows:

(347) "I met Miss Warrington and Miss Norris frequently the first week immediately *preceding our trip to Reno.*"

At page 348, likewise without objection, he said:

"We left for Reno two weeks after meeting her on the levee."

This meeting on the levee was the one at which he first discussed with Marsha Warrington the desirability of leaving Sacramento.

At page 16, referring to a discussion with Marsha Warrington, he said:

> "*I believe that was one week before we left for Reno on a Sunday night.*"
>
> (352) "They knew during the time we were *discussing our contemplated departure from Sacramento* that Mr. Caminetti was a married man living with his wife and had two children, the youngest one about three weeks old."

At page 357 Diggs further testified without objection:

> "*That night we went to Reno. Miss Warrington, Miss Norris and I left the Saddle Rock restaurant about 10 or 10:20. The first train going out for Reno was 10:45, which we intended to take had Mr. Caminetti been there. * * * I knew the 10:45 was an eastern train but I didn't know whether it went to Denver, Salt Lake,* or where it went, but *I intended to take it anyway.* Caminetti didn't show up in time for that train. We went back to the restaurant. I met him just as we were coming out of the restaurant the last time that night. He gave Miss Norris some money, I don't know how much. I believe she was in the restaurant when he gave it to her—in the Saddle Rock restaurant—and *after meeting Mr. Caminetti the four of us proceeded to the train.*"

After all this testimony had been given by Diggs in response to questions of his own counsel and on cross-examination, without any objection by his counsel, this question was asked:

> (358) "Q. In your testimony you have referred repeatedly to conversations and conferences that took place *before the Reno trip.* Now, what did you understand or mean by *the Reno trip?*"

His answer to that question was:

> "A. *It is perfectly evident what trip it was.*"

In view of this condition of the record, it is amazing that the counsel for this very defendant witness should take the position that the harmless question asked as just above shown was not proper cross-examination or that any claim of error could be based on the ruling of the trial court allowing it. Yet, at page 197, counsel say the defendant in his direct examination *had not testified to any matter in relation to the alleged trip to Reno.*

It would be well for counsel, in making a statement as boldly as that, to have spoken with better knowledge of the record.

X.

The Court Committed no Error in Curtailing and Limiting the Examination of the Jurors.

At pages 201-210 defendant's counsel argue the proposition thus stated:

> "Defendant was entitled to an examination of the talesmen which would have permitted intelligent use of his peremptory challenges. The denial of such right by the trial court in this case constitutes reversible error, defendant having thereby been deprived of a fair and impartial trial."

The criticism of the rulings of the trial judge in the matter of the examination of jurors is as un-

warranted as the covert attack on the fairness and impartiality of the trial judge made in connection therewith.

The opening sentence of the argument on this proposition is as follows:

> "Under separate assignments of error in this brief, we show misconceptions of the case indulged by the trial court."

At page 205 counsel say further:

> *"Counsel well knew that the evidence would disclose gross immoral conduct of the defendant, but that such conduct would not amount to an infraction of the statute under which the defendant had been indicted.* Defendant in such case was entitled to be tried by a jury composed of men broad-minded enough to perceive the distinction."

The evident purpose of counsel in the examination of the jurors was to develop in their minds the feeling entertained by counsel as to the supposed misconceptions on the part of the court of the law involved in the case on trial. The attitude of the judge towards a proper examination for the purpose of testing the mind of the juror Bloch is shown by the language quoted by counsel at page 203:

> "You can ask the juror if he will obey the instructions of the court and abide by the evidence. In other words, *if there are any elements in his mind that would preclude him from answering the question to that effect, you may ascertain that."*

Of course the record does not purport to give all the questions asked and answered in the case of

Juror Bloch or in the case of any other of the jurors. The fullest latitude was allowed during the examination of the jurors for the purpose of establishing whether or not any bias or prejudice existed which would prevent their giving to the defendant a fair trial. The refusal to allow the question quoted at page 204 was evidently justified on the ground stated on the same page:

> "*We submit that he has already answered that substantially.*
>
> The COURT. *Yes, he has. I do not see the necessity of repeating things of that kind. It does not add anything to it.* The jurors are intelligent men and they ordinarily mean what is imported by their answer. *He has already told you that the would obey the instructions of the Court and would be governed by the evidence in the case. Refrain from repetition.*"

The authorities cited by counsel to support their position afford no warrant for the criticism of the action of the trial judge in limiting the extent of the examination for the purpose of interposing peremptory challenges. The case of *State v. Steeves,* is in no way pertinent to the matter here under consideration.

The third syllabus is as follows:

> "The separate trial of a defendant jointly indicted for murder on the theory that he was an accessory before the fact, his co-defendant having been convicted, it is error to permit him to interrogate jurors as to their opinion of his co-defendant's guilt so as to enable him to intelligently use his peremptory challange."

This language indicates the closest connection the Steeves case has with the Diggs case.

No question of that character is presented here, and that is the only ruling in the case which seems to have any bearing at all on the matter herein discussed.

In speaking of the examination of talesmen for the purpose of peremptory challenge, *24 Cyc.*, 339, the authority quoted by counsel says:

> "*The nature and extent of this examination must be left largely to the discretion of the trial court, which will not be interfered with unless clearly abused.*"

In the case of the juror Woolsey to whom counsel desired to put questions which had been asked of the juror Porcher, the court evidently acted within the proper range of its discretion. In the case of jurors Porcher and Woolsey, very full examination had been allowed in the regular course when the names of the jurors were first regularly called for examination individually. Some time after the conclusion of the examination of Porcher, defendant's counsel asked liberty of the court to ask a question which had not been asked during the regular examination of that juror. In the case of Porcher the court allowed the question. The examination of the jurors, as we have said, occupied a great deal of the time of the court and counsel. Long after the examination of the juror Woolsey, which had been very full and which had been completed, defendant's counsel sought to reopen his examina-

tion for the purpose of asking the same questions that had been asked of the witness Porcher with reference to former service as a juror within the district within a year. Counsel claim that they should have been allowed to reopen the examination of Woolsey on the ground that the court had already allowed them to reopen the examination of the witness Porcher. Similarly they might have requested the court to reopen the examination of every one of the thirty-six jurors who had been examined before the jury was finally completed. In each case they were allowed to complete their examination of an individual juror before taking up the examination of any other juror whose qualifications were to be passed on. The matter of reopening at the mere caprice of the defendant the completed examination of a juror is a matter which certainly must be within the control of the judicial discretion. In this case there appears to have been no abuse of such discretion. If counsel desired to urge the objection that the juror Woolsey had served as a trial juror within a year, the time for him to do it was when Woolsey was under examination for the purpose of determining whether defendant could exercise either a challenge for cause or a peremptory challenge. Having failed at the proper time to urge the objection they should not be allowed to claim that the court exceeded its judicial discretion in refusing to reopen the examination.

XI.

The Trial Court Committed no Error in Refusing the Requested Instruction as to Influence Exerted on Marsha Warrington or Immunity Promised.

In Subdivision IX of their brief, at pages 211-212, counsel for plaintiff in error argue that the trial court committed error in refusing an instruction set out by them at page 211. By the proposed instruction the jury were directed, in weighing the testimony of Marsha Warrington, to consider whether she might be under the influence of any persons or under promise of immunity. The instruction was not proper or pertinent to any issue based on the testimony. Counsel for Diggs point to no testimony in the record supporting any claim of improper influence or promised immunity. The testimony of the record conclusively establishes the contrary. See testimony of Marsha Warrington set out at page 255 of the record.

XII.

No Error Was Committed by the Court in the Refusal of Requested Instructions—That Suspicion Was Not Proof—and That the Rule in Criminal Cases Differed From the Rule in Civil Cases.

At page 213 plaintiff in error, through his counsel, claims that the refusal to give two requested instructions shown on that page was error.

The first recites that suspicion is not proof and that guilt must be established beyond reasonable doubt. The other calls attention to the distinction between civil and criminal cases as to proof by mere preponderance or beyond reasonable doubt. The court had no occasion to instruct as to civil cases. The rule as to criminal cases was fully and correctly stated in the charge and with extreme regard to the defendant's rights.

XIII.

The Court Committed no Error in Refusing Instructions Quoted Under Points XI and XII of Defendant's Brief at Pages 215 to 242.

These two subdivisions of their argument relate entirely to instructions therein set out and the alleged error of the court in their refusal.

The instructions set out in Subdivision XI at pages 215 to 219 refer to the rule proper to be stated in cases of circumstantial evidence and the rule proper to be stated to a jury on the subject of reasonable doubt. The proper instructions were given by the judge as to both of these matters. See the portion of the charge in the record at pages 380 to 382.

The discussion by the defendant's counsel in Subdivision XII of their brief refers to the refusal of requested instructions on the subject of the specific intent denounced by the White Slave Traffic Act.

The matter of specific intent denounced by the statute was clearly and fully called to the attention of the jurors by the trial judge. The portion of his charge bearing on this question is shown at pages 371, 372, 374, 375, 378 and 379. That portion of his charge has been set out in the preceding pages of this brief. The instructions shown in this subdivision of their argument were based largely on the erroneous views of defendant's counsel as to the true intent and meaning of the White Slave Traffic Act and in consequence were erroneous and improper.

One instruction as shown at pages 225-226 of their brief may be taken as an exemplar of the vice found in their requested instructions, the refusal of which is relied on here as error:

> "Before you can convict the defendant of the crime charged in the indictment, you must find that at the time he did the acts alleged in said indictment, if you find beyond all reasonable doubt that he did them, that there existed in his mind the purpose and intent that the said Marsha Warrington should become the mistress and concubine of the said defendant; in other words, you must find beyond all reasonable doubt not merely the purpose of having sexual intercourse with her, but the purpose of creating the relation between himself and the said Marsha Warrington, of *concubinage, which is a natural marriage,* as contradistinguished from a legal or civil marriage, and for the purpose of having an habitual and continuous illicit cohabitation with her, and unless you find such purpose and intent actually existing in his mind at the time of the alleged commission of

the acts alleged in the indictment, you must find a verdict of acquittal."

The instruction quoted shows that among other delusions entertained by the counsel for plaintiff in error one was that *concubinage was a sort of marriage*. It is hardly necessary to argue to this court that the views entertained by counsel in this regard find no recognition in the law of marriage as recognized and administered in the courts of the United States. Concubinage is certainly not marriage and especially not in the case of men with wives and children still living, from whom their relations have never by any proper action been severed. The ancient doctrine that a man might procreate children by a woman not his wife, who would not be regarded as bastards but still could not inherit from him, has never been recognized as part of the American law of marriage.

An examination of each of the other instructions set out in this section of their brief will show that whatever was proper in them to be given to the jury for their guidance as law, was clearly, correctly and fully stated by the trial judge in his charge. We will not prolong this argument by reciting here those portions of the charge bearing on the matters under consideration. The charge itself, so far as requisite for a proper understanding of the questions presented, has been sufficiently set out in preceding pages. The law proper to be stated by the trial judge to the jury has been suffi-

ciently discussed in other subdivisions of this argument.

XIV.

The Instruction of the Trial Court that the Evidence Before the Jurors, if Believed, was Sufficient to Warrant Conviction was Correct.

At pages 248-249 plaintiff in error, through his counsel, claims that the trial court erred in its instruction to the jury, contained in the following language:

> "The evidence introduced before you by the government, if believed by you, is sufficient in legal effect, that is, in law, to sustain the conviction of the defendant upon each one of the several counts of the indictment, but *whether it is such as to satisfy you of its truth and establish the guilt of the defendant to the degree I have indicated, is, as I have heretofore stated, a question solely for your consideration.*"

It was clearly within the function of the trial judge to state that the evidence offered, if believed, was sufficient to warrant a conviction. He had as much right to pass on a question at the close of the testimony as he had to pass on a question of law involved by a demurrer to the indictment which presented the identical state of facts.

As to the matters properly within the jurisdiction of the jurors, those he clearly and definitely left to them for consideration.

Judge Van Fleet in the language quoted did not state to the jury that "in his opinion it was the duty of the jurors to convict". Therefore, we fail to see for what reason the action of the court in *Breece v. United States,* is called to the attention of this tribunal.

What the case of Becker, the New York policeman, has to do with the proper interpretation of the White Slave Traffic Act before this tribunal is not manifest to us. Its repeated suggestion to the court in this brief and the companion brief in the Caminetti case, and the repetition in various connection of the language used by the New York Court of Appeals, would seem to subserve only one purpose: as part of a concerted scheme to discredit the trial judge in the estimation of this appellate tribunal. Judge Van Fleet is not on trial. He needs no vindication at our hands. His clear conception of the facts and his absolutely correct declaration of the law, as shown in the rulings on the evidence and his directions to the jury, are perfectly manifest in the record before this court.

XV.

Refusal to Transfer Cause to Sacramento for Trial.

In Subdivision XIV of their brief, adverse counsel discuss the proposition thus stated at page 250:

> "The court erred in not granting the motion made on behalf of the defendant at the outset of the case to transfer the trial of the cause to

> Sacramento, where the offenses were charged in the indictment to have occurred, and where the defendant and the principal witnesses all resided."

This is the identical question presented as Point XXXIV in the Caminetti brief at pages 383 to 389. The claim made has no merit. Neither Sec. 72 of the Judicial Code nor the case of *People v. Powell,* 87 Cal. 348, affords any warrant for the claim made by counsel in this connection. The argument and the authority in the Diggs case and the Caminetti case are identical. The matter in our judgment is sufficiently disposed of by us in the reply to the Caminetti brief at pages.....to.....

XVI.

The Enactment of the White Slave Traffic Act was a Legitimate Exercise of the Legislative Power of Congress Under the Constitution of the United States.

At pages 258-260 counsel argue the proposition thus stated: "The Act of Congress of June 25, 1910 (36 Stats. 825), designated as the 'White-Slave Traffic Act', is unconstitutional." This contention is sufficiently met by the cases counsel mention on page 258 of their argument.

Hoke v. United States, 227 U. S. 308;
Athanasaw v. United States, 227 U. S. 326;
Bennett v. United States, 227 U. S. 333;
Harris v. United States, 227 U. S. 340.

In this connection see also:

United States v. Bitty, 208 U. S. 393; 52 L. Ed. 543;

John Arthur Johnson v. United States, (U. S. Circuit Ct. of Appeals, 7th Circuit, January Session 1914) 215 Fed. 679;

U. S. v. Flasblower, 205 Fed. 1007;

Wilson v. United States, 34 Sup. Ct. Rep. 347;

Weddel v. United States, (C. C. A.), 8th Circuit, March 30, 1914) 213 Fed. 208;

Latham v. United States, (C. C. A., 5th Circuit, January 25, 1914) 210 Fed. 159;

Kalen v. United States, (C. C. A., 9th Circuit, May 6, 1912) 196 Fed. 888;

Siniscalchi v. Thomas, 195 Fed. 701;

United States v. Westman, (decided by Wolverton, District Judge, Oregon District) 182 Fed. 1017;

Bennett v. United States, 194 Fed. 630;

United States v. Hoke, 187 Fed. 992.

In this connection the court is respectfully requested to refer to the argument of this question found in our brief in the Caminetti case, Subdivision III, at pages 44 to 73.

XVII.

There is no Merit in the Point that the Immorality Denounced by the White Slave Traffic Act is Only Commercialized or Commercial Vice.

In Subdivision XVI of their brief, at pages 261

to 331 of their argument, counsel argue the proposition thus stated:

> "The trial court erred in not holding that the facts proved by the prosecution, assuming them to be true, did not constitute such an offense as was intended by Congress to be prosecuted by virtue of the act known as the 'White Slave Traffic Act,' nor does the prevention and punishment of the things proven fall within the scope of the purpose for which that act was intended and which the defendant is charged with having violated, in that there was no evidence to show that the defendant profited by or expected to or intended to profit in or share in any profit ensuing or arising in pursuance of the transportation set out in the first count of the indictment, upon which defendant was convicted."

The argument shown at these pages of the brief of plaintiff in error in the present case is the identical argument advanced in the same language and with citation of the same authorities as that found in Subdivision II of the opening brief of defendant Caminetti in the case numbered 2405. The identical argument there presented is, in our judgment, covered by the argument and citations made by us in Subdivision III of our brief in the Caminetti case at pages 44 to 73. Counsel, however, attempt to distinguish between commercialized vice as displayed in the case of a woman taken to a neighboring state for the purpose of prostitution, and vice manifested in taking a woman to another state for debauchery and immoral purposes, and for having her live with the person causing her

transportation as his concubine or mistress. The language of the White Slave Traffic Act affords no ground for any such distinction.

In our former brief we called attention to the case of

United States v. Bitty, 208 U. S. 393; 52 L. Ed. 543.

That was an appeal from the action of the lower court reported in 155 Fed. 938.

The position taken by counsel for the accused in these two cases is identical with the position taken by District Judge Hough of the Circuit Court for the Southern District of New York, when he announced his decision on December 10, 1907. The act there involved was not the so-called White Slave Traffic Act, but the Immigration Law. At pages 939-940 (155 Fed.) the judge used this language:

> "It may be that, as the court remarked in the case cited, this defendant is guilty of an open violation of the divine law and of grossly immoral acts, so that such a case is not 'the most favorable for a dispassionate consideration of questions of law, the decision of which involves the question whether the party defendant shall be punished, or discharged as not guilty of any offense cognizable by the statute'. It is, however, necessary to apply to this statute, as to any other, the ordinary rules of construction, concerning which the discussion at bar has not revealed any substantial difference of opinion between opposing counsel.
>
> It may be admitted that the immigration act of 1907 is in its general scheme remedial; and

it is not denied that it is the duty of the court to give to each intelligible word of the statute its exact and precise meaning according to common understanding of the intent of the Legislature, so far as ascertainable from legal sources; and that intent, if expressed in apt language, must be enforced as long as the statute is in operation, though the result be cruel or ridiculous. So far as this statute is concerned I have been directed to no indication of legislative intent other than the language of the statute itself, except the report of the committee of the House of Representatives on immigration, made to the Fifty-ninth Congress at its first session (No. 4,912), wherein it is stated that the scope of section 3 of this statute is extended beyond that of the corresponding section of the act of 1903, 'so far as it relates to the immigration of prostitutes, in order effectively to prohibit undesirable practices alleged to have grown up'. This I take to mean that the words 'or for any other immoral purpose' have been added to the word 'prostitution', in order to prevent undesirable practices alleged to have grown up in relation to the immigration of prostitutes. Upon general principles the added words must be understood as meaning 'for any other like immoral purpose', so that the question becomes this: whether a man who brings his mistress into this country is committing an act ejusdem generis with bringing in a prostitute.

Concubinage is the act upon the part of the woman who is cohabiting with a man without ceremonial marriage, or consent and intent good at common law. A discussion of the difference between this status and that of the prostitute would be both needless and nauseating. It suffices to say that from any point of view, historical, social, or legal, I do not think that the mistress is near enough to the prostitute to be

included by general words in a statute directed against the latter unfortunate class."

The view of the circuit judge was not adopted by the Supreme Court of the United States when its opinion was announced by Mr. Justice Harlan, as follows:

"This is a criminal prosecution under an act of Congress regulating the immigration by aliens into the United States.

By the act of March 3d, 1875, chap. 141, relating to immigration, it was made a felony, punishable by imprisonment not exceeding five years and by fine not exceeding $5000, for any one knowingly and wilfully to import or to cause the importation of women into the United States for the purposes of 'prostitution'. 18 Stat. at L. 477, U. S. Comp. Stat. 1901, p. 1285.

By the act of March 3d, 1903, chap. 1012, it was provided: 'That the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden; and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold any woman or girl for such purposes in pursuance of such illegal importation, shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not less than one nor more than five years, and pay a fine not exceeding five thousand dollars.' 32 Stat. at L. 1213, 1214.

A more comprehensive statute regulating the immigration of aliens into the United States was passed on February 20th, 1907. By that act the prior act of 1903 (except one section) was repealed. The 3d section of this last statute was in these words: 'That the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other

immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and, on conviction thereof, be imprisoned not more than five years and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States, and shall be deported as provided by sections twenty and twenty-one of this act.' 34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1907, p. 389.

The defendant in error, Bitty, was charged by indictment in the circuit court of the United States for the southern district of New York with the offense of having unlawfully, wilfully, and feloniously imported into the United States from England a certain named alien woman for *'an immoral purpose', namely, 'that she should live with him as his concubine'.*

* * * * * *

We come now to the merits of the case, and they are within a very narrow compass. The earlier statutes, we have seen, were directed against the importation into this country of alien women for the purposes of prostitution.

But the last statute, on which the indictment rests, is, we have seen, directed against the importation of an alien woman 'for the purpose of prostitution *or for any other immoral purpose'*; and the indictment distinctly charges that the defendant imported the alien woman in question *'that she should live with him as his concubine'*; that is, in illicit intercourse, not under the sanction of a valid or legal marriage. Was that an immoral purpose within the meaning of the statute? The circuit court held, in effect, that it was not, the bringing of an alien woman into the United States that she may live with the person importing her as his concubine not being, in its opinion, an act *ejusdem generis* with the bringing of such a woman to this country for the purposes of 'prostitution'. Was that a sound construction of the statute?

All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of 'prostitution'. It refers to women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to 'the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement'. Murphy v. Ramsey, 114 U. S. 15, 45, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747, 764. Congress, no doubt, proceeded on the ground that contact with society on the part of alien women leading such lives would be hurtful to the cause of sound private and public morality and to the general well-being of the people.

Therefore the importation of alien women for purposes of prostitution was forbidden and made a crime against the United States. *Now, the addition in the last statute of the words, 'or for any other immoral purpose', after the word 'prostitution', must have been made for some practical object.* Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for the purposes of 'prostitution'. In forbidding the importation of alien women 'for any other immoral purpose', Congress evidently thought that there were purposes in connection with the importation of alien women which, as in the case of importations for prostitution, were to be deemed immoral. It may be admitted that, in accordance with the familiar rule of *ejusdem generis,* the immoral purpose referred to by the words 'any other immoral purpose' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. 2 Lewis' Sutherland, Stat. Constr. Sec. 423, and authorities cited. But that rule cannot avail the accused in this case; for the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute, may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse. We must assume that, in using the words 'or for any other immoral purposes', Congress had reference to the views commonly

entertained among the people of the United States as to what is moral or immoral in the relations between man and woman in the matter of such intercourse. Those views may not be overlooked in determining questions involving the morality or immorality of sexual intercourse between particular persons. Chief Justice Marshall, speaking for the court, said that 'though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has used them, would comprehend. *The intention of the legislature is to be collected from the words they employ.* * * * The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.' United States v. Wiltberger, 5 Wheat. 76, 95, 96, 5 L. ed. 37, 42, 43. In United States v. Winn, 3 Sumn. 209, 211, Fed. Cas. No. 16, 740, Mr. Justice Story said that the proper course is 'to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature'. To the same effect are United States v. Morris, 14 Pet. 464, 10 L. ed. 543; American Fur. Co. v. United States, 2 Pet. 358, 367, 7 L. ed. 450, 453; United States v. Lacher, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625; Sedgw. Stat. & Const. Law, 2d ed. 282; Maxwell, Interpretation of Statutes, 2d ed. 318; Guided by these considerations and rules we must hold that Congress intended by the words 'or for any other immoral purpose', to include the case of

> any one *who imported into the United States an alien woman that she might live with him as his concubine.* The statute in question, it must be remembered, was intended to keep out of this country immigrants whose permanent residence here would not be desirable or for the common good, and we cannot suppose either that Congress intended to exempt from the operation of the statute the importation of an alien woman brought here only that she might live in a state of concubinage with the man importing her, or that it did not regard such an importation as being for an immoral purpose.
>
> The judgment must be reversed, and the case remanded with directions to set aside the order dismissing the indictment and overrule the demurrer, and for such further proceedings as will be consistent with this opinion."

A still more recent case bearing on this same subject of commercial or commercialized vice, is that of *John Arthur Johnson v. United States of America,* determined by the U. S. Circuit Court of Appeals for the Seventh Circuit, January Session, 1914.

The accused in that case was the notorious pugilist and profligate Jack Johnson. The opinion of the Circuit Court of Appeals is by Baker, Circuit Judge.

The following is found in the opinion:

> "Plaintiff in error, defendant below, was convicted of violating the White Slave Traffic Act, which makes it a felony for any one knowingly to 'transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, any woman or girl for the purpose

of prostitution or debauchery or any other immoral purpose'.

One group of counts on which defendant was held charged that he procured the transportation of a girl from Pittsburgh to Chicago for the immoral purpose of having sexual intercourse with her. In another group the purpose laid was prostitution.

Respecting the first group the evidence showed that the girl, in financial straits at Pittsburgh, endeavored to reach defendant by long distance telephone; that an employee of defendant answered, and to him she told her plight; that the next day she received a telegram, signed 'Jack', asking what she needed for expenses; that in reply to her answer she received a telegram reading, 'I am sending you $75. Go to Chicago at Graham's and wait until I get there. Jack'; that she drew the $75 from the Postal Telegraph Company, purchased therefrom a ticket to Chicago, and traveled to that city on the Pennsylvania railroad; and that defendant shortly thereafter had sexual intercourse with this girl in Chicago.

No direct evidence was adduced to establish the authenticity of the telegrams. But from defendant's statement on the witness stand that he would not say that he had or had not sent them, from the fact that defendant on his arrival in Chicago called the girl by telephone at Graham's, and from the fact as testified to by the girl that defendant at their first meeting inquired, 'Did you receive the $75 I sent you?' the jury were warranted in finding that defendant was the author of the messages and the furnisher of the money for the girl's transportation.

On the evidence thus far cited, a suspicion might be entertained that the purpose of the transportation was sexual intercourse. This evidence also is consistent with the theory that

defendant had no sexual intent at the time he aided the girl in her travels. And the presumption of innocence would require the adoption of this theory if here the evidence stopped. But the record further establishes that before aiding this girl defendant habitually indulged in promiscuous sexual intercourse; that this girl was a prostitute; that defendant first met her several years before in a brothel; that throughout the period of their acquaintance they maintained sexual relations; and that frequently in his journeys about the country took the girl with him or had her travel to meet him, and always for the purpose of sexual intercourse. This additional evidence furnished a basis from which the jury could justifiably draw the inference of fact that when defendant furnished the transportation he did so for the purpose of having sexual intercourse with the girl after their arrival in Chicago, just as a jury may reject a defendant's protestation of innocence in passing counterfeit when the evidence shows that prior to the act in question he had habitually or frequently passed other similar counterfeits.

But a different situation affects the prostitution count. Telephone and telegraph messages contained no suggestion of prostitution. The only fact is that several days after the girl's arrival in Chicago defendant supplied the money to enable her to open and conduct a brothel. This fact might lead to a suspicion that defendant when providing transportation had the intent to aid her subsequently in her profession. But criminal convictions cannot be allowed to rest on suspicion. And there were no supplementary facts like those that support the sexual intercourse counts—no proof that defendant had ever been connected with or interested in brothels or that prior to the act in Chi-

cago he had ever aided this or any other girl to engage in prostitution.

Against upholding the conviction on the sexual intercourse counts defendant's first insistence is that the intention of Congress was otherwise. By noting current history we may be aware that the act, when applied to merely unlawful sexual intercourse, has been used as an instrument for blackmail or other oppressions; but that has nothing to do with a judicial ascertainment of the meaning and constitutionality of the act when it was adopted. *Reference is made to public debates as indicative of the author's intent. But the writer of a bill may explain his purpose to fellow members and they may vote for it solely because in their judgment it has a wider or narrower scope than he states. This is one of the considerations that ages ago led to the universal primary canon of interpretation, that in the absence of ambiguity apparent upon the face of a document extraneous references are not permissible and the meaning is to be gathered exclusively from the text with the words taken in their ordinary and usual meanings.*

A further urge is that the words 'prostitution or debauchery or other immoral purpose' do not cover sexual intercourse that is merely unlawful. 'Other immoral purpose' are words of such generality that a criminal conviction thereunder could not be tolerated for acts whose purpose was any and every sort of immorality. They must be limited to that genus of which the preceding descriptions are species. Defendant contends that the nexus, the attribute in common, is 'commercialed vice',— that a defendant cannot be guilty unless it be shown that he is financially concerned in 'the traffic in women'. Prostitution, the first species, involves the financial element. But there is no condition in the statute that the furnisher of transporta-

tion shall be guiltless unless he shares or somehow profits by the hire of the woman's body. And in Hoke's Case, 227 U. S. 308, *a conviction for transporting a woman 'for the purpose of prostitution' was upheld without proof that the woman was a 'white slave', an article of barter in 'the traffic in women' or that the defendant was interested in her earnings. Debauchery, the other named species, is restricted by its association with the first species to sexual debauchery,* a leading of a chaste girl into unchastity. *No financial element is necessarily involved in sexual debauchery; the statute introduces no such condition;* And Athanasaw's Case, 227 U. S. 326, teaches that the providing of interstate transportation for the mere purpose of attempting to lead a chaste girl into unchastity is a felony without proof that the defendant intended to be the debaucher *or that he expected to profit by the girl's hire if she should become a prostitute. So it becomes apparent that 'commercialed vice' or 'the traffic in women for gain' is not the common ground; that the nexus indicative of the genus is sexual immorality; and that fornication and adultery are species of that genus. This conclusion is fortified by U. S. v. Bitty,* 208 U. S. 393, *where in construing the prohibition of the immigration act against the importation of alien women 'for the purpose of prostitution or any other immoral purpose' the latter phrase was held to mean unlawful sexual intercourse regardless of financial considerations.* See also U. S. v. Flaspoller, 209 Fed. 1006, in reference to the White Slave Traffic Act.

Lawful power in Congress to pass an act of this scope is challenged. There was a time when it would have been interesting to examine the contention that the word 'commerce' in the Commerce Clause of the Constitution means only 'traffic in or an exchange of commodities'. But

> when the ultimate tribunal long ago definitely decided that the term also includes 'navigation and intercourse', that 'transportation of persons' in and of itself is 'commerce', and that 'commerce' may not only be 'regulated' but actually prohibited in the interest of the general welfare, no room was left for profitable discussion. Passenger Cases, 7 How. 283; Gloucester Ferry Case, 114 U. S. 196; Rahrer's Case, 140 U. S. 545; Covington Bridge Case, 154 U. S. 204; Addyston Pipe Case, 175 U. S. 226; Lottery Case, 188 U. S. 321; Hoke's and Athanasaw's Cases, supra. Whole ranges of acts, like those regulating carriers, safety appliances, employers' liability for injuries to interstate trainmen, hours of dispatchers' work, twenty-eight hour confinement to live stock, movements of diseased persons or animals, pure food, etc., are upheld only on the basis that 'transportation is commerce'. Nothing remains but to say that the present act obviously is concerned with the interstate transportation of persons. How far and with what governmental purposes the undoubted power shall be exercised must be determined by the legislature, not the judicial, department of government."

The law was sustained in a decision by District Judge Foster of the Eastern District of Louisiana, in *United States v. Flasboller,* 205 Fed. 1007.

The court there said:

> "The indictment sets out that the woman was persuaded to go from one state to another for the purpose of engaging in illicit intercourse, cohabitation, and concubinage with the accused. Certainly illicit cohabitation and concubinage are immoral acts analogous to prostitution, and come well within the letter of the statute.

> The White Slave Act has been held to be constitutional (see Hoke and Economides v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. ....., decided by the Supreme Court February 24, 1913), and is but a further declaration of the public policy of the United States as originally expressed in the immigration acts. In my opinion the case is on all fours with that of United States v. Bitty, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543, and the interpretation of the statute must be controlled by that decision." The demurrer will be overruled."

The immigration act, as will be observed from a reading of Mr. Justice Harlan's opinion, used the same general language as that found in the White Slave Traffic Act "or for any other immoral purpose". The title of the latter act is "An Act to further regulate interstate and foreign commerce by prohibiting the *transportation therein for immoral purposes* of women and girls, and *for other purposes*".

In the second section of the act, in speaking of the purpose of transportation, the language twice used is "for the purpose of prostitution or debauchery or for any other immoral purpose". Substantially the same language is repeated in Section 3 of the same statute, the words being "or any other immoral practice". The language is as general as could very well be made. The decision in the Bitty case, while made under another statute, construes the same general terms and has been recognized ever since as controlling in the proper interpretation or

construction of the White Slave Traffic Act involving the same general language.

While the statute is designated in Section 8 as the "White Slave Traffic Act", the expression white slave or white slave traffic is not mentioned in any of the first five sections of the statute. The first section to deal specifically by name with the subject of "White Slave Traffic" is Section 6.

In Section 6 for the first time we find specific reference to *"White Slave Traffic"*. Here we find mention of the international agreement signed at Paris May 18, 1904, and proclaimed by President Roosevelt on June 15, 1908.

The defendant's counsel in these cases rely largely on congressional construction as shown by the report of the majority of the Committee on Interstate and Foreign Commerce, and the debate in the House of Representatives thereon. Of course, we contend that judicial construction must prevail in the interpretation of the plain language of a statute as against legislative construction of the same especially in the absence of language deliberately set into the statute specifically defining its purpose to be otherwise than plainly shown on its face. Since counsel rely so implicitly and confidently on the language of the report of the majority of the committee on interstate and foreign commerce, let us take a look at it.

The bill referred to the committee was one "to regulate and prevent the transportation in inter-

state and foreign commerce of *alien women and girls for immoral purposes and for other purposes"*.

The bill as referred to the committee covered the transportation of *alien* women and girls only. As reported back and as enacted it covered the transportation of *women or girls* unlimited by the fact of *alienage*. The *aliens* were the only persons to reach whom the treaty or international agreement had to be relied on. The majority report in speaking of the provisions of the bill referred to the committee says (at page 2):

> "In the second section of the bill it is made a crime for any one to knowingly transport in interstate or foreign commerce any woman or girl *for the purpose of prostitution*, or for the purpose of inducing, enticing or compelling a woman *to become a prostitute*, and in the same section it is also made a crime for any one to knowingly procure a ticket to be used by a woman in interstate or foreign commerce going to a place *for the purpose of prostitution*, whereby such woman shall be actually transported in interstate or foreign commerce * * *.
>
> Section 3 of the bill makes it a crime for any person to knowingly persuade, induce, entice or coerce any woman or girl to go from one state to another *for the purpose of prostitution* and who shall thereby knowingly cause such woman to go or be transported as a passenger &c."
> * * *
>
> Section 4 applies only to a girl under the age of eighteen years and is practically the same as Section 3 except that it makes a higher penalty apply to the crime of leading a girl under eighteen to *become a prostitute* and transport her in interstate commerce for that purpose.
> * * * "

Let us contrast this language of the bill as stated in the report of the committee with the language of the statute.

Section 2 of the law enacted uses this language:

> "That any person who shall knowingly transport or cause to be transported * * * in interstate or foreign commerce * * * any woman or girl for the purpose of prostitution *or debauchery or for any other immoral purpose,* or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or *to give herself up to debauchery or to engage in any other immoral practice* * * * shall be deemed guilty of a felony, &c."

Section 3 of the law as enacted on June 25, 1910, after final action thereon by the Senate of the United States, as contrasted with the language of this committee report filed on June 21, 1909, and relied on so implicitly by counsel for respondents in error shows this language:

> "Section 3. That any person who shall knowingly persuade, induce, entice or coerce or cause to be persuaded, induced, enticed or coerced * * * any woman or girl to go from one place to another in interstate or foreign commerce * * * for the purpose of prostitution or *debauchery or for any other immoral purpose* or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or *debauchery or any other immoral purpose*, whether with or without her consent * * * shall be deemed guilty of a felony."

Section 4 of the law, speaking of the enticement of "any woman or girl under the age of eighteen

years" also adds after the word "prostitution" the added words of the earlier sections *"or debauchery or for any other immoral purpose"*.

Section 5 of the statute merely prescribes the court in which prosecution of offenses defined in the earlier sections shall be prosecuted. As above said, Section 6 of the statute is the first one that refers specifically to the White Slave Traffic.

We quote the entire section as follows:

> "Sec. 6. That for the purpose of regulating and preventing the transportation in foreign commerce of alien women and girls for purposes of prostitution and debauchery, and in pursuance of and for the purpose of carrying out the terms of the agreement or project of arrangement for the suppression of the white-slave traffic, adopted July twenty-fifth, nineteen hundred and two, for submission to their respective governments by the delegates of various powers represented at the Paris conference and confirmed by a formal agreement signed at Paris on May eighteenth, nineteen hundred and four, and adhered to by the United States on June sixth, nineteen hundred and eight, as shown by the proclamation of the President of the United States, dated June fifteenth, nineteen hundred and eight, the Commissioner General of Immigration is hereby designated as the authority of the United States to receive and centralize information concerning the procuration of alien women and girls with a view to their debauchery, and to exercise supervision over such alien women and girls, receive their declaration, establish their identity, and ascertain from them who induced them to leave their native countries, respectively; and it shall be the duty of said Commissioner General of Im-

migration to receive and keep on file in his office the statements and declarations which may be made by such alien women and girls, and those which are hereinafter required pertaining to such alien women and girls engaged in prostitution or debauchery in this country, and to furnish receipts for such statements and declarations provided for in this Act to the persons, respectively, making and filing them.

Every person who shall keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any country, party to the said arrangement for the suppression of the white slave traffic, shall file with the Commissioner General of Immigration a statement in writing setting forth the name of such alien woman or girl, the place at which she is kept, and all facts as to the date of her entry into the United States, the port through which she entered, her age, nationality, and parentage, and concerning her procuration to come to this country within the knowledge of such person, and any person who shall fail within thirty days after such person shall commence to keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any of the countries, party to the said arrangement for the suppression of the white-slave traffic, to file such statement concerning such alien woman or girl with the Commissioner General of Immigration, or who shall knowingly and willfully state falsely or fail to disclose in such statement any fact within his knowledge or belief with reference to the age, nationality, or parentage of any such alien woman or girl, or concerning

her procuration to come to this country, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than two thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment, in the discretion of the court.

In any prosecution brought under this section, if it appear that any such statement required is not on file in the office of the Commissioner General of Immigration, the person whose duty it shall be to file such statement shall be presumed to have failed to file said statement, as herein required, unless such person or persons shall prove otherwise. No person shall be excused from furnishing the statement, as required by this section, on the ground or for the reason that the statement so required by him, or the information therein contained, might tend to criminate him or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture under any law of the United States for or on account of any transaction, matter, or thing, concerning which he may truthfully report in such statement, as required by the provisions of this section."

In speaking of Section 6 of the bill reported by the committee of the House, the majority report under the head "International Agreement" uses this language:

"Section 6 of the bill is based *in part upon the right of Congress to regulate foreign commerce and in part upon the right to legislate in furtherance of an international treaty.* The United States in 1908 became a party to an international agreement for the suppression of the white slave traffic, and section 6 makes cer-

tain provisions to aid in carrying out by the United States the international agreement. It provides that the Commissioner-General of Immigration is designated to receive and centralize information concerning the procuration of alien women with a view to their debauchery, to receive their declarations, establish their identity, ascertain from them who induced them to leave their native countries, and to exercise supervision over them. It also provides that every person who *shall knowingly keep or harbor in any house of prostitution any alien woman within three years after she shall have entered the United States* shall file with the Commissioner-General of Immigration a statement concerning such woman, and if such keeper shall fail to file such statement within thirty days then he shall be guilty of a misdemeanor and subject to $2,000 fine and two years' imprisonment. If the keeper furnishes the statement, the woman under the immigration law will be deported in accordance with existing law. If the keeper fails to furnish the statement, the keeper will be punished.

A careful examination of the Constitution, the authorities, and the decided cases seem to show that the provisions of the bill, dependent upon the commerce clause of the Constitution, *come within the power of Congress and are Constitutional.*

It is no longer open to question that the transit of individuals from State to State is interstate commerce."

At page 6 of the majority report Section 3 of the Immigration Act as amended in 1907 is quoted, showing in its initial portion the following language:

"That the importation into the United States of any alien woman or girl for the purpose of

prostitution *or for any other immoral purpose* is hereby forbidden."

Referring to Section 3 of the Immigration Statute the report of the majority of the committee under the heading "Supreme Court decisions construing Section 3 of the Act of February 20, 1907" says:

"Section 3 of the act of February 20, 1907, has received the consideration of the Supreme Court in two cases.

In the first case, that of the United States v. John Bitty (208 U. S. 393), the Supreme Court held that a foreign woman being brought to the United States as the *personal, private mistress of a man living here was being imported 'for other immoral purposes', and that, therefore, the importer was subject to the penalty of the statute and the woman to deportation.*

This decision is not pertinent to the phase of the subject under discussion, and is mentioned only in passing.

The second case was that of Joseph Keller v. United States (213 U. S. 138). In the Keller case the Supreme Court was called to pass squarely upon the constitutionality of *that portion of the provision in question which made it an offense to harbor or maintain for the purposes of prostitution any alien woman or girl within three years of her entry into the United States.* The exact language of the provision in question is as follows: *'Or whoever shall keep, maintain, control, support, or harbor in any house or other place,* for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, *within three years after she shall have entered the United States,* shall, in every such case, be deemed guilty of a felony, etc."

* * * * *

The case was a *typical case of 'harboring' exclusively.* The uncontradicted testimony was to the effect that the woman, Irene Bodi, came to this country in November, 1905; that she remained in New York until October, 1907; then came to Chicago and went into a house of prostitution at South Chicago, *which the defendants purchased in November, 1907, finding the woman then in the house;* that she had been in the business of a prostitute for only a few months prior to the trial of the case, in October, 1908, and that the *defendants did not know her until November, 1907.*

The question of the *power of Congress to enact a law for the punishment of any one 'harboring' an alien woman within three years of her arrival,* regardless of whether or not she was a prostitute voluntarily or had entered that state against her will, *was squarely presented by the facts in the case.* The court held that Congress was without power to pass such a law, its position appearing from the statement contained in the following paragraph from the opinion of the court: 'While the keeping of a house of ill fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the State. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the States, for there is in the Constitution no grant thereof to Congress.'

Bearing in mind the facts in this case—namely, that so far as appeared in the case presented, the defendants had nothing whatever to do with the importation of the woman in question; that so far as they were concerned she was not in a house of ill fame against her will; and that she was an inmate of the house

when the establishment was purchased as a going concern—the following suggestions of the court contained in the opinion with reference to the conclusion the court might have reached had the facts been different, are important: For instance, the court says, page 144: 'It is unnecessary to determine how far Congress may go in legislating with respect to the conduct of an alien while residing here, for there is no charge against one; nor to prescribe the extent of its power in punishing wrongs done to an alien, for there is neither charge nor proof of any such wrong. So far as the statute or the indictment requires, or the testimony shows, she was voluntarily living the life of a prostitute, and was only furnished a place by the defendants to follow her degraded life.'

On page 147, the court says:

'The question is therefore whether there is any authority conferred upon Congress by which *this particular portion of the statute can be sustained.* By section 2 of article 2 of the Constitution power is given to the President, by and with the advice and consent of the Senate, to *make treaties,* but there is no suggestion in the record or in the briefs of a treaty with the King of Hungary *under which this legislation can be supported.'*

The Government stated in its brief these two propositions:

'The clause in question should be held valid because it relates to and materially affects the conditions upon which *an alien female may be permitted to remain in this country,* and the grounds which warrant her exclusion. * * *

The validity of the provision in question should be determined from its general effect upon the *importation and exclusion of aliens.'*

The court then, without stating whether or not either of these propositions was well taken,

dismissed them with the statement that 'the act charged has no significance in either direction'.

In considering the decision of the Supreme Court in the Keller case attention is especially called to the fact that in the opinion the court made the following suggestions:

'By section 2 of article 2, of the Constitution, power is given to the President, by and with the advice and consent of the Senate, *to make treaties,* but there is no suggestion in the record or in the briefs of a *treaty with the King of Hungary under which this legislation can be supported.*'

It is manifest that this is a most pregnant suggestion. A showing that the legislation in question was supported by a treaty could not be made at that time, however, for the reason that *at the time of the enactment of the legislation the United States was not a party to the international agreement covering the subject.* In fact, this Government did not adhere to the international agreement until a date *subsequent to the commission of the offense charged against Keller.*

In this connection the chronology of events is important. The existing statute on the subject of the importation of alien women for immoral purposes is contained in section 3 of the act approved February 20, 1907. The alleged illegal act of which the defendant stood convicted was the *harboring of an alien woman on June 1, 1908.* The United States did not become a party to the international agreement for the repression of the trade in white women until June 15, 1908, at which time this Government adhered to the agreement by virtue of a proclamation issued by President Roosevelt. It appears, therefore, that the statute in question became a law, and the offense involved was committed, previous to the date on which this

Government became a party to the international agreement.

So far Congress has not enacted legislation to insure the carrying out of the provisions of the treaty in question.

The following clearly appears from an analysis of the Supreme Court decision above mentioned:

First. That *Congress may properly enact legislation affecting the conduct of an alien while residing here for a period of at least two or three years after the alien's arrival.*

Second. That Congress may provide for the punishment of wrongs done to an alien during the probationary period—that is to say, the Supreme Court intimates very broadly that Congress has the power to enact a law *making it an offense to 'harbor' for immoral purposes,* by force or against her will, *an alien woman or girl within the limited period referred to.*

Third. That in the carrying out of a treaty obligation Congress has the authority to pass an act making it an offense to harbor an alien woman or girl for immoral purposes, even in the absence of a showing that force or restraint is used—that is to say, in the decision above referred to the Supreme Court suggests that a different conclusion might have been reached under the very clause then under consideration and it appeared that the provision in question was the carrying out of a treaty agreement."

The reference as made by the committee to the Bitty and Keller cases in no way discounts the full value of the Bitty case as sustaining the government's contention in the case at bar.

The report of the committee further shows that in its opinion, notwithstanding the ruling in the

Keller case, that Congress *prior to the international agreement or treaty* had no power to create a law making the harboring within the United States of a woman for the purpose of prostitution or for other immoral purpose, yet the bill as reported and as finally enacted would be clearly within the constitutional power of Congress.

The Bitty case as we have seen, clearly held that bringing a woman into the United States *for an immoral purpose* other than for prostitution *or to become the concubine or mistress of the importer,* was an offense which could be reached by federal legislation. The Keller case in no sense impairs the force or efficacy of that ruling as announced by Mr. Justice Harlan. Even the Keller case, according to the opinion of the majority of the House committee, no longer governs a condition of facts such as that presented to the court in the Keller case. The making of the international agreement or treaty following the suggestion of the Supreme Court in the Keller case, according to the opinion of the committee, clearly gave the Congress the right under the Constitution, to make "harboring" within a definite time of the arrival in this country of a prostitute, an offense under the statutes of the United States.

In our opinion and in that of every federal court passing on the question, since its announcement, the rule in the Bitty case clearly and absolutely sustains our contention in the matter of the proper construction of the so-called "White Slave Traffic Act". It

clearly sustains our contention that the act is constitutional legislation. It clearly sustains our contention that the transportation in either interstate or foreign commerce of a woman to become the concubine or mistress of the transporter makes him amenable to punishment under the letter of the statute. The Keller case was relied on in group of white slavery cases (Hoke and others) reported in 227 U. S. in supporting the contention there made that the statute was an invasion of the police powers of the states and without the grant of powers to Congress by the federal constitution. This contention availed not in that group of cases nor has it availed in any federal tribunal passing on the question since the decision in the white slavery cases announced by Mr. Justice McKenna.

The Bitty case absolutely sustains our contention that it was within the constitutional power of Congress to legislate against immoral practices other than commercialized vice. The Bitty case is still the law. Its force and authority has not been to any extent impaired by any ruling announced in the Keller case. The Keller case has lost its force and authority by reason of the international agreement or treaty entered into since that decision was announced. The condition of facts presented in the Keller case can clearly be reached by congressional action taken since the making of the international agreement or treaty covering the question. Furthermore, the Bitty case is recognized by the so-called white slavery cases reported in 227 U. S., by the

Jack Johnson case, decided by the Circuit Court of Appeals, and by the Flasboller case in 205 Fed. Rep. 1006.

The Paris agreement added nothing to the power of the Congress to legislate for American residents or citizens on the subject of vice other than commercialized vice. Under the commerce clause of the Constitution, the Congress had clearly the power to enact legislation by which it was made a crime to transport in interstate commerce women or girls for immoral purposes other than prostitution or commercialized vice, so-called.

XVIII.

IF AS TO ANY ONE OF THE FOUR COUNTS UNDER WHICH DEFENDANT WAS FOUND GUILTY THE INDICTMENT AND PROOF WERE SUFFICIENT, AND NO PREJUDICIAL ERROR IS SHOWN IN THE TRIAL OF THE ISSUES AS TO SUCH ONE COUNT, NO REVERSAL CAN BE ALLOWED.

Defendant Diggs was indicted on six counts. He was found guilty as to four. The penalty imposed was imprisonment for two years and a fine of $2000. Under Sections 2 and 3 of the statute the maximum penalty in each case is $5000 fine and five years imprisonment. If the record shows a sufficient indictment as to any one of the four counts on which defendant was found guilty, competent testimony in support thereof and absence of prejudicial error in the trial of the issues as to such one count no reversal should be ordered of the judgment. In

Johnson v. United States, 215 Fed. 687, the Circuit Court of Appeals of the Seventh Circuit, said:

> "If one criminal act is charged in several ways one good count supported by competent evidence, will sustain a general verdict of guilty. If several criminal acts are charged, and if the sentences are made to run concurrently, the same rule applies."

In *Kalen v. United States,* 196 Fed. 888, the court held that

> "Where a defendant indicted on two counts was convicted on both, and was given less than the maximum sentence permissible under either one, it is no ground for reversal of the judgment that one of the counts may have been defective."

See also in this connection

McDonald v. United States, 63 Fed. 426;

Evans v. United States, 153 U. S. 584; 38 Law Ed. 830;

Claasen v. United States, 142 U. S. 140; 35 Law. Ed. 966.

Summary.

Before bringing this argument to a close, we desire to suggest that a companion case is before the court for consideration,—*United States v. F. Drew Caminetti,* No. 2405. Both cases involve the same four persons and the same general facts. They both deal with the illicit relations existing between Marsha Warrington and Maury I. Diggs

and Lola Norris and F. Drew Caminetti, between October, 1912, and March 14, 1913. The same questions of law, with the exception of some minor matters, are presented by the record in each case. We respectfully request that in disposing of either case the argument of counsel presented in the other may be taken into consideration by the court.

In view of the length of the argument we have prepared an index showing the pages at which indicated subject matters have been considered. The index precedes the argument.

The facts alleged in the four counts of the indictment on which the defendant was found guilty were clearly established by the testimony presented during the trial. No doubt could exist in the mind of any reasonable being that the paramount purpose of Diggs in procuring the tickets and securing the Pullman accommodations for the transportation, was that he might continue his illicit relationship with Marsha Warrington in the State of Nevada and that his companion should likewise consummate his purpose of effectuating the ruin of the girl, Lola Norris. He fully intended, as did his associate, that the two women should, in Nevada, act as the mistresses and concubines of the two men. From early in October, 1912, until March, 1913, the two men acted together under all possible circumstances of time and place for the accomplishment of their common design,—the ruin of the two girls.

As to the law of the case we claim the following:

1. Much stress has been laid by counsel for plaintiff in error on the proposition that the trial judge committed error in commenting in his charge on the silence of the defendant and his failure to explain or deny the incidents of the Reno trip. The authorities abundantly sustain our position that it is clearly within the function of a federal judge to express his opinions as to matters of fact provided always that he informs the jury that whatever opinion he may have expressed, they ultimately have the exclusive right to pass on all questions of fact.

Since the elimination of the Missouri cases by decisions reported in 157 and 158 S. W., practically no judicial authority sustains the position taken by counsel on this matter. The Balliet case, so much relied on by them, certainly affords no foundation for the claim made that either Judge Van Fleet erred in his charge or that counsel for the government in their argument were guilty of misconduct in contending that the jurors in arriving at a verdict might take into account the fact that Diggs had failed to testify as to the incidents of the Reno trip.

2. Marsha Warrington and Lola Norris, neither in law nor in fact were accomplices of defendant Diggs. There was no reason why the trial judge should instruct the jury that they were such accomplices or that their testimony should be received with caution or viewed with distrust.

In this connection see the following language quoted by Judge Cooper at page 20 of his argument as printed:

> "The following extracts show the general understanding in the House as to the scope of the bill.
>
> 45 Cong. Rec., Pt. 1, p. 812:
>
> 'Mr. RICHARDSON. *This bill does not punish the alien woman, or any other woman, for being transported from one State to another, does it?*
>
> Mr. SIMS. Do you desire that it should?
>
> Mr. RICHARDSON. I am asking you if it does. Yet you punish the man who aids the woman. *You punish him for aiding a crime that you do not punish her for committing.*' "

3. The amazing proposition that the only issue involved in the indictment escaped the attention of the trial judge and of counsel for the government has certainly not been established by plaintiff in error.

4. The matter of the blood-stained sheet, so frequently and so bitterly adverted to by counsel, hardly deserves the dignity of passing mention.

5. The charge of misconduct during the argument by both counsel for the government is absolutely without adequate or any foundation in the record. Whatever was said by them during argument and whatever suggestion was made by them or either of them to the jury, as to the proper discharge of their duty was clearly legitimate argument and in no way transcended the proper limits set for forensic discussion. If, however, as a matter

of fact, any language or conduct of counsel could be regarded as sufficient basis for a charge of misconduct, no proper procedure was resorted to by counsel for plaintiff in error for the purpose of bringing that question regularly before this court for review.

6. The seemingly serious objection urged by counsel for the defendant to the asking of the question, what he meant by the Reno trip, has been absolutely disposed of by reference to the record of his testimony.

7. No error was committed by the trial court in the matter of refusing to allow the defendant to reopen the examination of jurors after they had already completed such examination.

8. The record affords no evidentiary foundation for the claim that the court erred in not instructing the jurors that they might consider whether the witnesses Warrington and Norris had acted under any improper influence or had been promised immunity for their testimony.

9. The trial judge was clearly warranted by the testimony in stating that the evidence produced before them by the government, if believed, was sufficient to warrant a conviction. The language used by the trial judge in this connection was not the equivalent of that criticized in *Breece v. United States,* that "In his opinion it was the duty of the jurors to convict".

10. The defendants were not entitled to have the cause transferred to Sacramento for trial.

11. The enactment of the White Slave Traffic Act was a legitimate exercise of the legislative power of the Congress under the constitution of the United States. The question of the constitutionality of the law has been repeatedly determined by the highest tribunal in the land.

12. There is no merit in the point urged by counsel for defendant that the immorality denounced by the White Slave Traffic Act is *only commercialized vice*. Even the congressional report so much relied upon by defendant's counsel, if carefully examined, affords no foundation for the claim so persistently made by them that the statute was not intended to cover other cases of immorality than that which they are pleased to term the traffic in white slaves. The report shows conclusively that the bill reported on December 21, 1909, was not in form the same as the law when finally enacted six months later after passing through the Senate. Both the Immigration Statute and the White Slave Traffic law cover other cases than prostitution. The construction put by the Supreme Court on the language of the Immigration Statute, must be followed in passing on the identical language when found in the White Slave Traffic Act. Under the facts and the law, the judgment of the trial court should be allowed to stand as the

final and proper determination of the questions here involved.

Dated, San Francisco,
November 28, 1914.

Respectfully submitted,

THEO. J. ROCHE,
Special Assistant to the Attorney General.

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